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# Abortion and Disgust

Courtney Megan Cahill

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# Abortion and Disgust

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Courtney Megan Cahill\*

*This Article uses disgust theory — defined as the insights on disgust by psychologists and social scientists — to critique disgust’s role in abortion lawmaking. Its starting point is a series of developments that independently highlight and call into question the relationship between abortion and disgust. First, the Supreme Court introduced disgust as a valid basis for abortion regulation in its 2007 case *Gonzales v. Carhart*. Second, psychologists have recently discovered a sufficiently strong association between individual disgust sensitivity and abortion opposition to suggest that disgust might drive that opposition. They have also discovered that “abortion disgust” appears to be unrelated to harm concerns — e.g., harm to the fetus — on which oppositional abortion rhetoric and restrictive abortion laws often explicitly rest. Third, legislatures around the country have passed hundreds of restrictive abortion laws in 2010 and 2011. If moral psychologists are right, then disgust underwrites most, if not all, of those laws.*

*Taking these developments seriously, this Article synthesizes the key insights of psychology, social science, and sex equality scholarship to make two arguments, one descriptive and the other constitutional. First, abortion disgust is not a reaction to harm to the mother or to death of the fetus, but rather to perceived gender role violations by women. Second, this genealogy of abortion disgust constitutes the best reason why we ought to reject disgust as a basis for abortion regulation, allied as that emotion is to unconstitutional sex stereotyping — or what the Court has called unconstitutional “role typing.” This Article concludes by suggesting that “rejecting disgust” in abortion lawmaking might mean subjecting all abortion laws to heightened scrutiny under the Equal Protection Clause, given disgust’s likely role in animating all abortion regulation.*

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## INTRODUCTION

Last year marked the fifth anniversary of *Gonzales v. Carhart*,<sup>1</sup> the Supreme Court's most recent abortion decision, in which it upheld the first-ever federal ban on abortion.<sup>2</sup> *Gonzales* was a landmark decision for several reasons. First, it signaled the Court's adoption of a woman-protective justification for restricting access to abortion.<sup>3</sup> Second, it signaled the Court's virtual abandonment of the common law informed consent doctrine in the abortion context.<sup>4</sup> Third, as discussed more fully below, it signaled the introduction of an entirely new rationale for abortion regulation: disgust.<sup>5</sup> Even as the Court jettisoned disgust as a valid basis to regulate homosexuality in its 2003 landmark case *Lawrence v. Texas*,<sup>6</sup> it sanctioned disgust as a valid basis to regulate homosexuality's culture war companion, abortion, just four years later.<sup>7</sup>

<sup>1</sup> 550 U.S. 124 (2007).

<sup>2</sup> See *id.* at 124 (upholding the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006)).

<sup>3</sup> See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1696 (2008) [hereinafter Siegel, *Dignity and the Politics of Protection*] (discussing *Gonzales*'s woman-protective justification); see also Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 834–38 (2007) (discussing the woman-protective justification in restrictive abortion legislation) [hereinafter Siegel, *Sex Equality Arguments for Reproductive Rights*].

<sup>4</sup> See Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion*, 76 GEO. WASH. L. REV. 1599, 1602–03 (2008); see also Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1, 24–27 (2007).

<sup>5</sup> See Sonia M. Suter, *The "Repugnance" Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1588 (2008).

<sup>6</sup> 539 U.S. 558 (2003); see *id.* at 577 ("The fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))). In *Lawrence*, the Court rejected morality as a legitimate state interest for laws criminalizing consensual sexual relations between persons of the same sex. See *id.* Given that disgust is a particularly extreme form or manifestation of moral judgment, we can presume that in rejecting morality the Court rejected disgust as well.

<sup>7</sup> For a fuller discussion of *Gonzales*'s disgust rationale, see *infra* notes 58–77 and accompanying text. Whether *Lawrence* stands for the proposition that morality (and therefore disgust) is never a valid constitutional basis for legal regulation is open to dispute. The Eleventh Circuit, for instance, has more than once questioned the validity of *Lawrence*'s rejection of

In the six years since *Gonzales* was decided, abundant critical attention has focused on the *Gonzales* majority's woman-protective rationale and on why it undercuts constitutional sex equality norms.<sup>8</sup> Remarkably, though, very little critical attention has centered on the *Gonzales* majority's deployment of disgust and on why it undercuts those same norms. Even as disgust emerges from *Gonzales* as a valid basis for abortion regulation, and even as scholars have criticized disgust's role in other legal contexts<sup>9</sup> and have demonstrated a strong association between disgust and abortion opposition,<sup>10</sup>

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morality as a legitimate state interest. *See, e.g.,* Williams v. Morgan, 478 F.3d 1316, 1318 (11th Cir. 2007) (finding that "public morality survives as a rational basis for legislation even after *Lawrence*," and therefore affirming a lower court ruling upholding Alabama's law criminalizing the distribution of sex toys); Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 819 n.17 (11th Cir. 2004) (favorably citing pre-*Lawrence* cases where the Court concluded "that there is not only a legitimate interest, but a substantial government interest in protecting order and morality" (internal quotation and citation omitted)). As to the role of morality in lawmaking after *Lawrence*, Professor William Eskridge has remarked that "few constitutional scholars think the narrowest or the broadest reading of *Lawrence* [on this question] is correct." William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1012 (2005); *see also* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004) (examining the constitutional status of morals-based legislation after *Lawrence*).

<sup>8</sup> *See, e.g.,* Chris Guthrie, Carhart, *Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877, 882 (2008); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1641-43, 1649-50 (2008); Ronald Turner, *Gonzales v. Carhart and the Court's "Women's Regret" Rationale*, 43 WAKE FOREST L. REV. 1, 4-5 (2008); Rebecca E. Ivey, Note, *Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in Gonzales v. Carhart*, 94 VA. L. REV. 1451, 1452-53 (2008); *see also* Siegel, *Dignity and the Politics of Protection*, *supra* note 3, at 1712-33; Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1, 28-29 (2008).

<sup>9</sup> *See, e.g.,* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 26 (2010) [hereinafter NUSSBAUM, FROM DISGUST TO HUMANITY] (rejecting disgust as a valid basis for laws criminalizing same-sex relations and laws prohibiting same-sex marriage); MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 256-71 (2004) [hereinafter NUSSBAUM, HIDING FROM HUMANITY] (same); Martha C. Nussbaum, "Secret Sewers of Vice": *Disgust, Bodies, and the Law*, in THE PASSIONS OF LAW 19, 45 (Susan A. Bandes ed., 1999) [hereinafter Nussbaum, "Secret Sewers of Vice"] (arguing that disgust is never a valid basis for legal regulation); Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1577-1601 (2005) (critiquing disgust-based arguments against same-sex relationships); Eskridge, *supra* note 7, *passim* (rejecting disgust as a valid basis for regulating a variety of out groups, including sexual minorities and people with disabilities); Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 557-62 (2002) (critiquing disgust-based arguments in favor of enhanced sex offender legislation). For legal scholars who have taken a different position on this issue, *see* WILLIAM IAN MILLER, THE ANATOMY OF DISGUST 17-18 (1997) (considering disgust as an indispensable feature of culture); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1621 (1998) (reviewing MILLER, *supra*, making the liberal case for disgust's operation in lawmaking); Leon R. Kass, *The Wisdom of Repugnance*, NEW REPUBLIC, June 2, 1997, at 17-18 (making the conservative case for disgust's operation in lawmaking).

<sup>10</sup> Abortion has been described as conduct with high "'yuck' potential." DANIEL KELLY, YUCK! THE NATURE AND MORAL SIGNIFICANCE OF DISGUST 150 (2011). Recent empirical

the abortion-disgust relationship remains curiously under-evaluated.<sup>11</sup> Remarkable on its own, such under-evaluation is strategically undesirable considering that in the past two years, hundreds of restrictive abortion laws have been passed in the United States<sup>12</sup> — including laws that address issues, like fetal pain, that are highly susceptible to provoking disgust.<sup>13</sup> Thus, it is not

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work by moral psychologists certainly confirms this intuition. *See infra* notes 85–99 and accompanying text.

<sup>11</sup> This is not to say that legal scholars have completely ignored the relationship between abortion and disgust. For instance, Professor Sonia Suter has addressed disgust in the abortion context at some length. *See Suter, supra* note 5, *passim*. In that article, however, she is principally concerned with considering how *Gonzales*'s repugnance rationale would or could affect laws regulating alternative reproductive technologies rather than with considering disgust's role in the abortion context specifically. *Id.* at 1588–89. In addition, Professor Suter does not apply disgust theory to abortion regulation, as this Article does. *See id.* Similarly, Professor Terry A. Maroney refers to the *Gonzales* Court's reliance on disgust in her article *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 900 (2009). However, she only applies disgust theory to *Gonzales* briefly in a few footnotes. *See id.* at 900–01 nn. 216 & 217. Finally, Professor Eskridge alludes to the abortion-disgust connection, but only in passing. *See Eskridge, supra* note 7, at 1014 (arguing that “[t]he continuing legitimacy of such a politics [of disgust and contagion] has serious consequences for women seeking abortions, people with disabilities, lesbians, gay men, and transgendered people in the United States”).

<sup>12</sup> *See, e.g.,* Editorial, *The Courts Step In: Judges' Recent Rulings Show How Extreme Antiabortion Measures Have Become*, N.Y. TIMES, July 14, 2011, at A26 (referring to the “extreme anti-abortion, anti-family-planning movement accelerating in the states and in Washington”); Erik Eckholm, *New Laws in 6 States Ban Abortions After 20 Weeks*, N.Y. TIMES, June 27, 2011, at A10 (stating that “dozens of new restrictions passed by states this year have chipped away at the right to abortion by requiring women to view ultrasounds, imposing waiting periods or cutting funds for clinics”); *States Enact a Record Number of Abortion Restrictions in First Half of 2011*, THE GUTTMACHER INST. (July 13, 2011), <http://www.guttmacher.org/media/inthenews/2011/07/13/index.html>; Dahlia Lithwick, *The Death of Roe v. Wade*, SLATE (Apr. 19, 2011), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/04/the\\_death\\_of\\_roe\\_v\\_wade.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/the_death_of_roe_v_wade.html) (reporting that as of April 2011, “916 measures seeking to regulate reproductive health have been introduced in 49 states”); *State Legislative Trends: Hostility to Abortion Rights Increases*, THE GUTTMACHER INST. (Apr. 12, 2011), <http://www.guttmacher.org/media/inthenews/2011/04/12/index.html>; Jennifer Steinhauer, *Under Banner of Fiscal Restraint, Republicans Plan New Abortion Bills*, N.Y. TIMES, Feb. 9, 2011, at A18 (noting that the United States House of Representatives is “more pro-life than it's ever been”).

<sup>13</sup> *See* Eckholm, *supra* note 12 (discussing fetal pain laws); *see also infra* note 80 and accompanying text. As of the writing of this Article, nine states have passed fetal pain laws that ban abortion at twenty-weeks gestation and beyond on the basis of the pain that fetuses purportedly feel at that point during pregnancy. *See* Kathryn Smith, *Abortion-Rights Groups Absent on Fetal Pain Laws*, POLITICO (Aug. 13, 2012, 4:20 PM), <http://www.politico.com/news/stories/0812/79681.html?hp=r3>. Some commentators have argued that fetal pain laws are “absolutely unconstitutional” or “clearly unconstitutional,” *see* Eckholm, *supra* note 12, because they categorically ban abortion before viability in violation of both *Roe* and *Casey*. Notwithstanding these statutes' dubious constitutionality, only one fetal pain law has been challenged in court — unsuccessfully — on constitutional grounds. *See* Isaacson v. Horne, 884 F. Supp. 2d 961, 971 (D. Ariz. 2012) (upholding Arizona's fetal pain law that bans abortion at twenty-weeks gestation). Professor I. Glenn Cohen has argued that fetal pain laws “present a major threat to abortion rights as we know them.” I. Glenn Cohen, *The Flawed Basis Behind Fetal-Pain Abortion Laws*, WASH. POST (Aug. 1, 2012), [http://www.washingtonpost.com/opinions/the-flawed-basis-behind-fetal-pain-abortion-laws/2012/08/01/gJQAS0w8PX\\_story.html](http://www.washingtonpost.com/opinions/the-flawed-basis-behind-fetal-pain-abortion-laws/2012/08/01/gJQAS0w8PX_story.html). “[I]t is entirely possible,” Professor Cohen remarks, “that [fetal pain laws] will garner five votes on the current Supreme Court and change the face of abortion law as we know it.” *Id.* For a nuanced consideration of fetal pain legislation's constitutionality, *see* I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability and the Constitution*, 39 J.L.

just that disgust can and does play a role in abortion law, but that disgust will continue to play such a role moving forward.

Taking these developments as its starting point, this Article is the first to combine disgust theory, defined here as the insights on disgust by psychologists and social scientists, and constitutional sex equality scholarship to critique the abortion-disgust relationship. It first looks to disgust theory to establish the following: (1) that disgust for abortion exists; (2) that “abortion disgust,” as this Article refers to it, animates abortion opposition and restrictive abortion laws; and (3) that abortion disgust reflects an extreme discomfort with the disruption of gender norms that abortion represents. It then uses this genealogy of abortion disgust to make a constitutional argument, namely, that abortion disgust raises concern in light of the “anti-stereotyping principle” in sex discrimination law.<sup>14</sup> The tension between abortion disgust and that principle might be the best reason why courts should scrutinize all abortion classifications for unconstitutional sex stereotyping, and not just those in which sex stereotyping is explicit.

Recent findings from moral psychology on the abortion-disgust relationship ought to prompt deeper inquiry into the emotion — disgust — that possibly underwrites a large swath of abortion opposition. These findings suggest not only that disgust might be playing a formative role in driving abortion opposition and its attendant laws,<sup>15</sup> but also that something other than concerns about harm to the mother or to the fetus is driving that disgust.<sup>16</sup> They raise the question of what, if not concerns about harm, is driving abortion disgust and its attendant laws? Indeed, what *is* the genealogy of this emotion that appears to fuel the abortion taboo? And what does that genealogy mean as a constitutional matter, particularly now that disgust has received the Supreme Court’s blessing in the abortion context?

This Article ties together key insights of social science and sex discrimination scholarship to answer these questions. It first uses a particular theory of disgust — one which has been called one of the “most famous” theories of disgust<sup>17</sup> and “one of the leading anthropological” theories of the twentieth century<sup>18</sup> — to answer the descriptive question of what beyond harm explains abortion disgust. Mary Douglas, the renowned anthropologist and expositor of that theory, famously argued that nothing is inherently disgust-

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MED. & ETHICS 235, 241 (2011). For the relationship between disgust and fetal pain legislation, see *infra* notes 80–83 and accompanying text.

<sup>14</sup> Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 83 (2010); see also *id.* at 158 (stating that the Court’s recent sex equality jurisprudence “situates abortion regulation in a new constitutional space — one constrained by the anti-stereotyping principle”).

<sup>15</sup> See *infra* notes 84–85 and accompanying text.

<sup>16</sup> See *infra* notes 99–107 and accompanying text.

<sup>17</sup> NUSSBAUM, HIDING FROM HUMANITY, *supra* note 9, at 91 (referring to Mary Douglas’s theory of disgust as one of the two “most famous” disgust theories).

<sup>18</sup> John Copeland Nagle, *The Idea of Pollution*, 43 U.C. DAVIS L. REV. 1, 3 (2009) (observing that “[s]cholars now recognize [Douglas’s] work [on pollution] as one of the leading anthropological writings of the twentieth century”).

ing. Rather, disgust is our reaction to “matter out of place.”<sup>19</sup> Things (and people) disgust, Douglas wrote, when they confuse social roles and deviate from cultural norms. In her words, things disgust when they “confuse accepted classifications”<sup>20</sup> and violate “[our] cherished classifications.”<sup>21</sup> As Professor William Miller explains, “[i]n Douglas’s scheme it is the anomalous, the things that don’t fit the classificatory principles, that pollute.”<sup>22</sup> Scholars have used Douglas’s social theory of disgust to better understand a range of legal issues, from pornography laws<sup>23</sup> and environmental pollution regulation,<sup>24</sup> to prohibitions on sodomy<sup>25</sup> and same-sex marriage.<sup>26</sup> This Article uses her theory to understand better the genealogy of abortion disgust. More specifically, it argues that Douglas’s theory of disgust helps to illuminate the principal driver of abortion disgust: the idea that women would renounce motherhood given the opportunity to embrace it. Such women, this view contends, violate “[our] cherished classifications”<sup>27</sup> and “confuse [our] accepted classifications”<sup>28</sup> in a way that provokes extreme discomfort and often disgust. As a recent sociological study on abortion stigma proposed, “a woman who seeks an abortion is inadvertently challenging widely-held assumptions about the ‘essential nature’ of women.”<sup>29</sup> Such women, its authors maintain, are stigmatized for being “inferior to ideals of womanhood.”<sup>30</sup>

After describing Douglas’s social role theory of disgust and applying it to abortion, this Article uses it to make a constitutional equality argument. Over the past thirty years, constitutional law theorists have been increasingly interested in illuminating sex discrimination law’s anti-stereotyping principle

<sup>19</sup> See MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* 44 (1966) [hereinafter DOUGLAS, *PURITY AND DANGER*]; see also MARY DOUGLAS, *IMPLICIT MEANINGS: SELECTED ESSAYS IN ANTHROPOLOGY* 109 (2002) [hereinafter DOUGLAS, *IMPLICIT MEANINGS*].

<sup>20</sup> DOUGLAS, *IMPLICIT MEANINGS*, *supra* note 19, at 109; see also DOUGLAS, *PURITY AND DANGER*, *supra* note 19, at 45.

<sup>21</sup> DOUGLAS, *IMPLICIT MEANINGS*, *supra* note 19, at 109.

<sup>22</sup> MILLER, *supra* note 9, at 44.

<sup>23</sup> See John Copeland Nagle, *Pornography as Pollution*, 70 MD. L. REV. 939, 946 (2010) (using Douglas’s theory of pollution to understand pornography regulation).

<sup>24</sup> See Nagle, *supra* note 18, *passim* (explaining Douglas’s theory and using it to understand environmental pollution).

<sup>25</sup> See Suzanne B. Goldberg, *Sticky Intuitions*, 57 UCLA L. REV. 1375, 1388–89 (2010) (using Douglas’s social theory of disgust to explain persistent animus against same-sex couples); Eskridge, *supra* note 7, at 1025–26 (using Douglas’s theory of pollution to understand disgust for sodomy as well as other “phenomena and practices that do not fit labels or that cross lines”).

<sup>26</sup> See Cahill, *supra* note 9, at 1579–83 (using Douglas’s theory to understand disgust’s operation in the debate over same-sex marriage and in criminal incest laws).

<sup>27</sup> DOUGLAS, *IMPLICIT MEANINGS*, *supra* note 19, at 109.

<sup>28</sup> *Id.*

<sup>29</sup> Anuradha Kumar et al., *Conceptualising Abortion Stigma*, 11 CULTURE, HEALTH & SEXUALITY 625, 628 (2009).

<sup>30</sup> *Id.* at 628.

and in making the equality argument for the abortion right.<sup>31</sup> Most notable among them is Professor Reva Siegel, who has recently advanced the equality argument for abortion through a careful analysis of woman-protective anti-abortion rhetoric.<sup>32</sup>

This Article furthers and deepens the sex equality project of Professor Siegel and others by viewing abortion regulation through the theoretical lens of disgust. Doing so, it submits, suggests that restrictive abortion laws might violate the anti-stereotyping principle even when they do not contain overtly sexist rhetoric. Indeed, the theory of abortion disgust advanced here suggests that all restrictive abortion laws, not just those that explicitly idealize women as mothers or that purport to protect women, are vulnerable to equality challenges because a disruptor of egalitarian norms — disgust — plays such a powerful role in giving rise to them.

This Article unfolds in four parts. Part I provides an overview of disgust's operation in abortion law. It looks in particular at the Supreme Court case that validated disgust as a constitutional basis for abortion regulation, *Gonzales v. Carhart*, and at the wealth of recent empirical work in moral psychology establishing a relationship between disgust and abortion opposition. The objective of this Part is twofold: (1) to show that disgust is a constitutional basis for abortion regulation; and (2) to suggest that disgust likely plays a role in a large swath of abortion regulation, not just in the regulation of controversial issues like dilation and extraction ("D&X") abortion, the procedure at issue in *Gonzales*. Moreover, this Part sets the groundwork for considering the best reason why we ought to be wary of disgust's presence in abortion law (the one reason that scholars have missed): because of the constitutional equality norms that abortion disgust disrupts.

Parts II and III then make the case for how, exactly, abortion disgust disrupts those norms. Part II uses disgust theory to dig deeper into the abortion-disgust relationship and to unearth a moral genealogy of abortion disgust. Part III, in turn, uses that genealogy to argue that abortion disgust (and the laws that flow from it) conflicts with the anti-stereotyping principle in constitutional sex equality law. Part IV concludes by briefly considering what it would mean for the legal community to "reckon" with explicit and implicit disgust in abortion lawmaking, particularly given disgust's seemingly pervasive presence there.<sup>33</sup>

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<sup>31</sup> See, e.g., Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights*, *supra* note 3, *passim*; see also *infra* notes 270–72 and accompanying text.

<sup>32</sup> See, e.g., Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 991, 1020 (2007).

<sup>33</sup> I am borrowing this term from Professor Charles Lawrence's iconic article, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). The relevance of Lawrence's article to this project will be treated *infra* in Part IV.



## I. ABORTION, DISGUST, AND LAW: AN OVERVIEW

This Part provides an overview of abortion and disgust in the law. Section A reviews the evolution of disgust-based reasoning and rhetoric in Supreme Court abortion jurisprudence, paying particular attention to its role in *Gonzales*. Section B reviews recent studies in moral psychology that provide a solid basis for arguing that disgust likely plays a role in a wide variety of abortion regulations, not just in the kind of regulation that was at issue in *Gonzales*. Section C discusses the arguments some scholars have offered against disgust in abortion regulation and introduces constitutional sex equality norms as the best justification for why we ought to be concerned about its presence there.

A. *Disgust May (as a Constitutional Matter) Drive Abortion Law*

The Supreme Court has been considering the abortion issue for almost forty years, and during that time, disgust has evolved from playing no role whatsoever in abortion decisions to becoming an independent justification for abortion restrictions. The Court first grappled with the abortion issue in 1973, the year it established the constitutional right to abortion in *Roe v. Wade*<sup>34</sup> and *Doe v. Bolton*.<sup>35</sup> Justice Blackmun opened *Roe*'s majority opinion by declaring that emotions — and therefore, by implication, disgust<sup>36</sup> — must play no part in abortion jurisprudence, intoning that “[o]ur task . . . is to resolve the issue by constitutional measurement, free of emotion and of predilection.”<sup>37</sup> Coming from a Justice elsewhere accused of engaging in a “legally unsophisticated and overly emotional . . . jurisprudence of sentiment,”<sup>38</sup> and considering that abortion is arguably the most hotly contested right in Supreme Court history,<sup>39</sup> Blackmun's promise to approach it “free of emotion” is nothing short of remarkable.

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<sup>34</sup> 410 U.S. 113 (1973); *see id.* at 164 (finding that the Fourteenth Amendment's Due Process Clause protects a fundamental right to privacy that includes abortion, and striking down Texas's criminal abortion law for violating that right).

<sup>35</sup> 410 U.S. 179 (1973); *see id.* at 201 (holding that a Georgia law requiring that a woman obtain approval for an abortion from a hospital abortion committee and limiting abortion to Georgia residents violated the right to privacy under the Fourteenth Amendment's Due Process Clause).

<sup>36</sup> The six basic and universally recognized emotions are disgust, anger, fear, happiness, sadness, and surprise. *See* RACHEL HERZ, *THAT'S DISGUSTING: UNRAVELING THE MYSTERIES OF REPULSION* 29 (2012).

<sup>37</sup> *Roe*, 410 U.S. at 116.

<sup>38</sup> Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, *NEW REPUBLIC* (May 2, 1994), <http://www.tnr.com/article/politics/sentimental-journey> (criticizing Justice Blackmun's “jurisprudence of sentiment”). For an examination of Justice Blackmun's abortion rhetoric generally, *see* Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 *WASH. & LEE L. REV.* 193, 232–34 (2002).

<sup>39</sup> *Hope Clinic v. Ryan*, 195 F.3d 857, 876 (7th Cir. 1999) (Posner, C.J., dissenting) (stating that there is no “hotter” issue than “the issue of abortion rights”), *vacated*, 530 U.S. 1271 (2000).

As Supreme Court decisions go, *Roe* largely delivers on its promise to resolve the abortion issue with dispassion. If anything, Justice Blackmun's majority opinion has been criticized for its lack of emotion and for reading more like a history lesson or a medical treatise than an impassioned vindication of either the right of the fetus or the right of the woman.<sup>40</sup> Perhaps more surprising is the fact that disgust is absent from the two dissents as well. Justice Rehnquist's dissent, in fact, even commends the majority opinion as one that "commands my respect," resting as it does on "extensive historical fact and a wealth of legal scholarship."<sup>41</sup>

Disgust first surfaced in Supreme Court abortion jurisprudence in a few dissenting opinions in 2000, the year that the Court considered the constitutionality of a state D&X ban in *Stenberg v. Carhart*.<sup>42</sup> Popularly known by its non-medical name — "partial-birth" abortion<sup>43</sup> — D&X is an infrequently used second-trimester abortion procedure that involves the termination of an intact fetus. It is a later-term (though not necessarily a late-term) method of abortion, one that provoked intense public opposition after it was first publicized in 1992.<sup>44</sup>

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<sup>40</sup> See, e.g., LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING ix (2010) ("The women's movement and the right-to-life movement shaped arguments made to the Court in *Roe*. But the Court responded to these arguments only indirectly."); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1625 (1987) (critiquing the unemotional aspects of *Roe*'s majority opinion and arguing that it is "virtually free of the story of women").

<sup>41</sup> *Roe*, 410 U.S. at 171 (Rehnquist, J., dissenting). Justice White, who undoubtedly writes the most emotional of all of *Roe*'s opinions, directs his vehemence primarily toward the majority for its "exercise of raw judicial power" in inventing a "new constitutional right." *Doe v. Bolton*, 410 U.S. 179, 221–22 (1973) (White, J., dissenting).

<sup>42</sup> 530 U.S. 914 (2000) (striking down a state law banning "partial-birth" abortion as a violation of the abortion right under the Fourteenth Amendment).

<sup>43</sup> On the origin of the term "partial-birth" abortion, see Julie Rovner, "*Partial-Birth* Abortion: Separating Fact From Spin," NPR (Feb. 21, 2006, 9:44 PM), <http://www.npr.org/templates/story/story.php?storyId=5168163>. Rovner reports that "partial-birth" is "not a medical term," but rather "a political" one, a term that

was first coined by the National Right to Life Committee (NRLC) in 1995 to describe a recently introduced medical procedure to remove fetuses from the womb. Alternately known as "dilation and extraction," or D&X, and "intact D&E," it involves removing the fetus intact by dilating a pregnant woman's cervix, then pulling the entire body out through the birth canal.

*Id.*

<sup>44</sup> Not long after Dr. Martin Haskell first publicized the procedure in 1992, a wave of criminal D&X abortion statutes, including the federal statute upheld in *Gonzales*, swept the nation. See generally MARTIN HASKELL, DILATION AND EXTRACTION FOR LATE SECOND TRIMESTER ABORTION (1992), reprinted in 139 CONG. REC. E1092 (daily ed. Apr. 28, 1993), and in *The Partial-Birth Abortion Ban Act of 1995: Hearing before the S. Comm. on the Judiciary*, 104th Cong. 5 (1995). In one D&X case, Judge Richard Posner remarked that the legislative frenzy surrounding "partial-birth" abortion did "not exhibit the legislative process at its best, whatever one thinks of abortion rights." *Hope Clinic*, 195 F.3d at 880 (Posner, C.J., dissenting). For the chain of events leading from Dr. Haskell's presentation on intact dilation and extraction to the enactment of the federal "partial birth" ban, see Siegel, *Dignity and the Politics of Protection*, *supra* note 3, at 1707 n.40.

In *Stenberg*, a divided Court struck down Nebraska's criminal D&X statute for two reasons. First, the statute failed to contain a health exception, as required under *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>45</sup> Second, the statute amounted to an unconstitutional "'undue burden' upon a woman's right to terminate her pregnancy before viability."<sup>46</sup> Although *Stenberg* struck down a D&X statute on constitutional grounds, it marked disgust's entry into the Supreme Court's abortion jurisprudence.<sup>47</sup> In fact, one could argue that D&X abortion — a procedure highly susceptible to graphic depictions and visceral reactions — represented an opportunity seen and seized by abortion opponents to introduce disgust into the abortion debate. As one abortion opponent put it, the very term "partial-birth abortion" was "thought up in hopes that 'as the public learns what a "partial-birth abortion" is, they might also learn something about other abortion methods, and that this would foster a growing opposition to abortion.'"<sup>48</sup>

Disgust is the predominant lexicon not of the *Stenberg* majority, but rather of those Justices in dissent.<sup>49</sup> Justice Scalia (who generally "reserves his angriest work product" for abortion<sup>50</sup>), Justice Kennedy, and Justice Thomas characterize D&X, as well as abortion procedures that remain legal

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<sup>45</sup> See *Stenberg*, 530 U.S. at 938 (finding that the Nebraska statute violated Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992), which requires abortion laws to include a health exception for procedures that are "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" (quoting *Roe*, 410 U.S. at 165 (1973))).

<sup>46</sup> *Stenberg*, 530 U.S. at 938. The "undue burden" test was announced in *Casey*, 505 U.S. at 877 (requiring courts to ask whether a law regulating abortion "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus").

<sup>47</sup> Indeed, the D&X controversy gave the Court its very first occasion to describe in graphic detail *all* abortion procedures, including those that remain legal today. See *Stenberg*, 530 U.S. at 983 (Thomas, J., dissenting) (observing that "[i]n the almost 30 years since *Roe*, this Court has never described the various methods of aborting a second- or third-trimester fetus"). It is no surprise, then, that disgust first entered the Supreme Court's abortion lexicon in the "partial-birth" context.

<sup>48</sup> See Rovner, *supra* note 43 (quoting Douglas Johnson of the NRLC).

<sup>49</sup> That said, there are also some indications in the majority opinion that D&X makes even its supporters squirm. Justice Breyer, for instance, prefaces the section of his *Stenberg* majority opinion that describes D&X, among other abortion methods, with a "reader beware" moment. He says:

Considering the fact that those procedures seek to terminate a potential human life, our discussion may seem clinically cold or callous to some, perhaps horrifying to others. There is no alternative way, however, to acquaint the reader with the technical distinctions among different abortion methods and related factual matters, upon which the outcome of this case depends.

*Stenberg*, 530 U.S. at 923. Breyer's caveat lector moment arguably provokes the dread and disgust that it anticipates. In so doing, it quite possibly amplifies the "horrifying" details of the technical abortion descriptions that follow. Compare *id.* at 923, with *Hope Clinic*, 195 F.3d at 861 (framing a discussion of abortion's technical aspects in a decision upholding the constitutionality of criminal abortion laws by simply stating that "[s]ome medical background is essential to understanding the issues").

<sup>50</sup> Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 459 (2011).

today, in disgust-driven terms, calling them “barbarian,”<sup>51</sup> “abhorrent,”<sup>52</sup> “gruesome,”<sup>53</sup> and “so horrible” as to evoke “a shudder of revulsion.”<sup>54</sup> Moreover, they describe abortion procedures, including but not limited to D&X, at length and in graphic detail. If sodomy was for many jurists the “crime not fit to be named,”<sup>55</sup> then abortion, for the *Stenberg* dissenters, is a crime that cannot help but speak its name — and in agonizing detail.<sup>56</sup>

Three years after the *Stenberg* ruling, Congress passed, and President George W. Bush signed into law, the federal Partial-Birth Abortion Ban Act (“Act”), which made the performance of a D&X abortion a federal crime.<sup>57</sup> Four years after that, in *Gonzales v. Carhart*, a divided Court upheld the Act, despite the fact that it failed to contain a health exception, as required under *Stenberg* and other abortion precedent, and despite the fact that it categorically prohibited a pre-viability method of abortion.<sup>58</sup> Characterized by one commentator as a decision with “narrow and modest language,”<sup>59</sup> Justice Kennedy’s majority opinion in *Gonzales* is “modest” in the Swifitean sense only — not just with respect to what it holds but also, and perhaps especially, with respect to how it gets there.<sup>60</sup>

Justice Kennedy’s *Gonzales* opinion reads in many ways like his *Stenberg* dissent, from his initial framing of the Court’s discussion of abortion procedures,<sup>61</sup> to the targeted lexicon he employs throughout that discussion,<sup>62</sup> to his graphic and lengthy abortion descriptions — descriptions that reveal to readers “more than they ever wanted to know about the mechanics

<sup>51</sup> *Stenberg*, 530 U.S. at 954 (Scalia, J., dissenting) (referring to the federal Act as an “anti-barbarian law”).

<sup>52</sup> *Id.* at 979 (Kennedy, J., dissenting).

<sup>53</sup> *Id.* at 983 (Thomas, J., dissenting).

<sup>54</sup> *Id.* at 953 (Scalia, J., dissenting).

<sup>55</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*218.

<sup>56</sup> If judicial disgust for homosexuality historically took the linguistic form of preterition — the rhetorical device whereby the speaker emphasizes something by omitting it or by adamantly refusing to talk about it — then judicial disgust for abortion in *Stenberg* takes the linguistic form of excess. See Courtney Megan Cahill, (*Still*) *Not Fit to Be Named: Moving Beyond Race to Explain Why Separate Nomenclature for Gay and Straight Relationships Will Never Be “Equal,”* 97 GEO. L.J. 1155, 1178 (2009) (discussing preterition in the context of legal discussions of homosexuality/sodomy).

<sup>57</sup> Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006).

<sup>58</sup> 550 U.S. 124, 165, 147 (2007).

<sup>59</sup> Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1521 (2008).

<sup>60</sup> See, e.g., Garrett Epps & Dahlia Lithwick, *The Sphinx of Sacramento: Will the Real Justice Kennedy Please Stand Up?*, SLATE (Apr. 27, 2007, 6:01 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2007/04/the\\_sphinx\\_of\\_sacramento.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2007/04/the_sphinx_of_sacramento.html) (referring to the “visceral horror” that emerges from Kennedy’s *Gonzales* and *Stenberg* opinions).

<sup>61</sup> Compare *Gonzales*, 550 U.S. at 134 (stating that “[t]he Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in *Stenberg*, to discuss abortion procedures in some detail”), with *Stenberg v. Carhart*, 530 U.S. 914, 958 (2000) (Kennedy, J., dissenting) (stating that “it seems necessary at the outset to set forth what may happen during an abortion”).

<sup>62</sup> That lexicon includes labeling doctors who perform abortions “abortion doctors,” *Gonzales*, 550 U.S. at 144, referring to a woman who obtains an abortion as a “mother” (even after her pregnancy is terminated), *id.* at 159, and variously describing a fetus as an “unborn child”

of abortion.”<sup>63</sup> He variously refers to D&X as conduct that “implicates . . . ethical and moral concerns that justify a special prohibition,” and as a procedure that “perverts a process during which life is brought into the world.”<sup>64</sup> Finally, he directs the medical profession to “find . . . less shocking methods to abort the fetus in the second trimester.”<sup>65</sup>

Disgust, however, is not just *Gonzales*’s dominant linguistic register. It is also one of the primary rationales on which the majority rests its decision to uphold the federal D&X ban. Along with maternal regret,<sup>66</sup> disgust emerges from *Gonzales* as an “entirely new justification for prohibiting certain abortion procedures,”<sup>67</sup> and one which “no prior case dealing with reproductive rights has described.”<sup>68</sup> To be sure, the *Gonzales* majority never explicitly states that “disgust” is a valid basis for abortion regulation. It does, however, uphold the Act to “express[] respect for the dignity of

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and a “baby.” *Id.* Justice Ginsburg criticizes the majority for using these terms. *See id.* at 186–87 (Ginsburg, J., dissenting).

<sup>63</sup> Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1234 (2010). Professor Suk remarks that “the text of *Carhart* . . . told readers more than they ever wanted to know about the mechanics of abortion. In so doing it produced one of the opinion’s most criticized features — its graphic description of the procedures at issue.” *Id.* Kennedy’s “graphic description” of abortion in *Gonzales* is the rhetorical analogue to anti-abortion advocacy’s disgust-driven visual imagery. *See id.* at 1235 (noting that “[c]ommentators have suggested that such graphic details in *Carhart*’s text express revulsion with abortion, much in the way that some antiabortion advocacy deploys graphic representations”). For disgust’s role in “visual” abortion rhetoric, see Nick Hopkins et al., *Visualising Abortion: Emotion Discourse and Fetal Imagery in a Contemporary Abortion Debate*, 61 SOC. SCI. & MED. 393, 398 (2005) (stating that certain visual images of abortion are “portrayed as providing a window on reality,” and that “strong emotional reactions of disgust” to those images “are construed as deserving of attention and respect for the information that they convey”); see also Rosalind Pollack Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 FEMINIST STUD. 263, 263 (1987) (discussing also the cultural impact images of abortion touted to be realistic have).

<sup>64</sup> *Gonzales*, 550 U.S. at 158, 160. One is here reminded that combating “perversion” was a rationale to which certain members of Congress adverted in support of the federal Defense of Marriage Act (“DOMA”) during debates over that law. In the floor debate over DOMA, members of Congress repeatedly expressed their aversion to homosexuality, calling it “immoral,” 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn) [hereinafter Statement of Coburn]; “depraved,” 142 CONG. REC. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer) [hereinafter Statement of Buyer]; “unnatural,” *id.* at H7494 (statement of Rep. Smith); “based on perversion,” Statement of Coburn, *supra*; and “an attack upon God’s principles,” Statement of Buyer, *supra*.

<sup>65</sup> *Gonzales*, 550 U.S. at 160.

<sup>66</sup> Professor Siegel observes that *Gonzales* marked the first time that the Court adopted “a woman-protective justification for restricting access to abortion.” Siegel, *Sex Equality Arguments for Reproductive Rights*, *supra* note 3, at 837. For the history of the woman-protective justification in anti-abortion advocacy generally, see *id.* at 835 & nn. 67–68. The logic of that justification is as follows: the “bond of love the mother has for her child” represents the “ultimate expression” of “[r]espect for human life.” *Gonzales*, 550 U.S. at 159. Given this (conclusory) fact, women could suffer from intense regret, anguish, and grief upon discovering the gruesome particulars of D&X after having one. *See id.* Thus, far from amounting to an unconstitutional undue burden, the federal D&X ban eliminates the burden that is truly undue for women: post-abortion regret.

<sup>67</sup> Suter, *supra* note 5, at 1580.

<sup>68</sup> *Id.*

human life,”<sup>69</sup> and to protect society from becoming “coarsen[ed]” by the knowledge that such a “brutal and inhumane procedure” not only exists but is legal.<sup>70</sup> In other words, it upholds the Act for purely expressive reasons, suggesting that repugnance to abortion — or, at least, to a particular abortion procedure — is a good enough reason to ban it. Moreover, the Act’s under-inclusivity raises the strong possibility that disgust concerns, rather than “human life” concerns, were its primary motivation. As Justice Ginsburg remarks in dissent, not one fetus is actually saved by the Act.<sup>71</sup> Consequently, the Act does not credibly advance a governmental interest (as the majority asserts) in respecting “human life.” Rather, the Act’s principal concern is with minimizing (or eliminating) shock/disgust, and not with minimizing (or eliminating) fetal harm.

The *Gonzales* majority in no way limits the “‘repugnance’ approach”<sup>72</sup> that it embraces to a particular abortion procedure (i.e., to D&X) — or, indeed, to abortion more generally.<sup>73</sup> For this reason, some commentators have suggested that *Gonzales* establishes a precedent for disgust or moral judgment to play a more active role in abortion jurisprudence moving forward. Professor Ronald Dworkin, for instance, has argued that after *Gonzales*, any “sound medical procedure [may be outlawed] for no better reason than that many find [that procedure] disturbing or immoral.”<sup>74</sup> Professor Sonia Suter echoes these concerns, arguing that “given the ultimately unpersuasive grounds for upholding an abortion ban with no health exception, *Gonzales* suggests that . . . repugnance can be sufficient justification for limiting abortion rights.”<sup>75</sup> Indeed, even Justice Ginsburg observes in her *Gonzales* dissent that the “moral concerns” that the Court embraces “could yield prohibitions on any abortion.”<sup>76</sup> Thus, “moral concerns” — or, more accurately, disgust concerns — are now constitutionally legitimate reasons

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<sup>69</sup> *Gonzales*, 550 U.S. at 157.

<sup>70</sup> See, e.g., *id.* (citing approvingly to Congress’s statement that “[i]mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of . . . all vulnerable and innocent human life” (internal citation omitted)).

<sup>71</sup> *Id.* at 181 (Ginsburg, J., dissenting); see also *Hope Clinic v. Ryan*, 195 F.3d 857, 880 (7th Cir. 1999) (Posner, C.J., dissenting) (“[Criminal D&X statutes] are not concerned with saving fetuses, with protecting fetuses from a particularly cruel death, with protecting the health of women, with protecting viable fetuses, or with increasing the Wisconsin population (as intimated, surely not seriously, by Wisconsin’s counsel). They are concerned with making a statement in an ongoing war for public opinion. . . .”), *vacated*, 530 U.S. 1271 (2000).

<sup>72</sup> Suter, *supra* note 5, at 1583.

<sup>73</sup> See *id.* at 1587 (discussing how *Gonzales*’s repugnance rationale might be used to justify restrictions on alternative reproductive technologies).

<sup>74</sup> Ronald Dworkin, *The Court & Abortion: Worse than You Think*, N.Y. REV. BOOKS (May 31, 2007), <http://www.nybooks.com/articles/archives/2007/may/31/the-court-abortion-worse-than-you-think/?pagination=false>.

<sup>75</sup> Suter, *supra* note 5, at 1583.

<sup>76</sup> *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting). Justice Ginsburg also reminds the majority that in prior abortion cases, the Court reasoned that such moral concerns “cannot control our decision.” *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

to regulate all abortion, and perhaps even to eliminate the abortion right entirely.<sup>77</sup>

### B. *Disgust Likely (as a Factual Matter) Animates Abortion Law*

Whereas *Gonzales v. Carhart* establishes that disgust *may* (as a constitutional matter) drive abortion regulation, recent studies in moral psychology suggest that disgust in fact *does* animate that regulation. To be sure, some may argue that we do not need moral psychology to tell us that disgust is playing a role in abortion regulation because numerous other indicators of abortion aversion in lawmaking exist. For instance, some abortion regulation — like D&X regulation — is so surrounded by such an explicit rhetoric of disgust that disgust's constitutive role in that regulation is obvious.<sup>78</sup> Other abortion laws appear calculated to provoke disgust for abortion because of what they regulate and what they reach. The recently enacted fetal pain laws, for instance, target an issue — fetal pain — whose “disgust factor” is rather high.<sup>79</sup> Premised on a medically contested claim,<sup>80</sup> fetal pain laws capture so few abortions performed annually (1%) that they appear above all to be “merely exercises in symbolic lawmaking.”<sup>81</sup> At least one

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<sup>77</sup> Whether such concerns are constitutionally valid in other contexts is unclear. For instance, in a recent free speech case, Justice Scalia reminded one of his colleagues that “disgust is not a valid basis for restricting expression.” *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011). Moreover, the Court has suggested that disgust is an invalid basis under the Fourteenth Amendment on which to justify discriminatory treatment of sexual minorities generally and same-sex relations specifically. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that morality does not constitute a legitimate state interest under the Due Process Clause); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that animus or hostility against individuals on account of their membership in a class — there, sexual minorities — does not constitute even a legitimate state interest under the Equal Protection Clause).

<sup>78</sup> For instance, Judge Posner has suggested that the legal controversy surrounding D&X abortion in the 1990s was driven principally by disgust for abortion rights generally. In a case considering the constitutionality of a state D&X ban, Judge Posner pointed out that the wave of state D&X prohibitions did “not exhibit the legislative process at its best, whatever one thinks of abortion rights.” *Hope Clinic v. Ryan*, 195 F.3d 857, 880 (7th Cir. 1999) (Posner, C.J., dissenting), *vacated*, 530 U.S. 1271 (2000). “Whipped up,” as he put it, “by activists who wanted to dramatize the ugliness of abortions,” *id.* at 881, the principal objective of these statutes was to put abortion in the public eye — and, in so doing, to stir up the public’s disgust for it. *See also* Siegel, *Dignity and the Politics of Protection*, *supra* note 3, at 1707 (“[Anti-abortion advocates’] objective was to focus [D&X] legislation and litigation on visceral details of one infrequently employed second-trimester procedure, with the aim of stimulating opposition to abortion generally.”).

<sup>79</sup> Amanda C. Pustilnik, *Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law*, 97 CORNELL L. REV. 801, 842 (2012).

<sup>80</sup> Fetal pain laws, which prohibit abortion at twenty-weeks gestation and beyond, rest on the “fact” that fetuses feel pain starting at twenty-weeks gestation. Professor Pustilnik argues that this claim “run[s] contrary to the current weight of medical evidence on fetal pain,” which indicates that fetal pain occurs much later in a pregnancy, shortly before birth. *Id.* at 844.

<sup>81</sup> *Id.* at 843, 846; *see also id.* at 844 (“These figures suggest that the legislation’s very slight, practical impact on abortion procedures . . . could not by itself have justified the legislation’s passage.”).

commentator has argued that “repugnance to abortion — not the issue of fetal pain itself — is the driving force behind these statutes.”<sup>82</sup>

While we might already know that disgust plays a role in abortion regulation, however, studies in moral psychology on the abortion-disgust relationship deepen that knowledge in a way that is legally significant for two reasons. First, the studies demonstrate that disgust likely plays a role in a large swath of abortion regulation, not just in the regulation of particularly controversial abortion procedures (like D&X abortion) or in the context of particularly inflammatory abortion issues (like fetal pain). As such, they suggest that Justice Ginsburg’s prediction — that “moral concerns,” or what this Article calls disgust concerns, “could yield prohibitions on any abortion” — may very well ring true, if it has not already. Second, the studies suggest that it is not just disgust that is animating abortion regulation, but disgust divorced from any concern about harm prevention. As such, they raise the possibility that restrictive abortion laws do not satisfy the constitutional requirement that all laws rest in some way on harm prevention.<sup>83</sup> Equally important, they provide a point of departure for thinking more critically about the genealogy of this emotion that, as of 2007, constitutes a legitimate basis for abortion regulation.

For the possibility that disgust plays a formative role in driving abortion opposition generally, consider a 2009 study that tested disgust’s role in shaping individuals’ political orientations.<sup>84</sup> Among other things, the study’s au-

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<sup>82</sup> *Id.* at 843.

<sup>83</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (distinguishing between state regulation of harmful versus non-harmful conduct, and maintaining that the state may not reach the latter but may reach the former, which includes conduct involving “minors[,] . . . persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused[,] . . . public conduct[, and] prostitution”).

<sup>84</sup> Yoel Inbar et al., *Conservatives Are More Easily Disgusted than Liberals*, 23 COGNITION & EMOTION 714 (2008) [hereinafter Inbar et al., *More Easily Disgusted*]. This study received considerable media coverage and stimulated considerable academic interest in the connections between disgust sensitivity and political ideology. For media coverage, see, for example, Jennifer Harper, *Studies: Conservatives Easier to Disgust*, WASH. TIMES (June 6, 2009), <http://www.washingtontimes.com/news/2009/jun/06/conservatives-more-easily-disgusted-than-liberals/?page=all>; Peter Liberman & David Pizarro, *All Politics Is Olfactory*, N.Y. TIMES (Oct. 23, 2010), <http://www.nytimes.com/2010/10/24/opinion/24pizarro.html>. Studies before this one found that disgust is an important moral foundation for conservatives in particular, and that conservatives are more likely to agree that certain conduct should be categorically prohibited if it violates purity norms and is therefore disgusting, even if it is non-harmful. See, e.g., Jesse Graham et al., *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. PERSONALITY & SOC. PSYCHOL. 1029, 1029 (2009) (finding that conservatives, more so than liberals, use purity and sanctity as moral intuitions); Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May Not Recognize*, 20 SOC. JUST. RES. 98, 108 (2007) (discussing the relative importance of disgust as a moral intuition for conservatives); Jonathan Haidt & Matthew A. Hersch, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. APPLIED SOC. PSYCHOL. 191, 211–12 (2001) (discussing conservatives and disgust). Moreover, previous studies investigated “the possibility that conservatives are more likely than liberals to experience disgust in response to *specific behaviours* that violate ideals of purity.” Inbar et al., *More Easily Disgusted*, *supra*, at 715–16 (summarizing past research). The 2009 study discussed here was the first to investigate “whether there is a broader relationship between dis-



thors found that the more disgust-sensitive someone was, the more likely she was to oppose the claim that “[a] woman should have the right to choose what to do with her body, even if that means getting an abortion.”<sup>85</sup> People with a “[d]ispositional proneness to disgust” — that is, people who had a general disposition to feeling disgusted by a variety of stimuli, including core disgust elicitors like feces and rotting meat, as well as sexual disgust elicitors like incest and zoophilia — were more likely to adopt conservative political attitudes toward such issues as gay marriage and abortion.<sup>86</sup> Even controlling for the potentially confounding variable of religious affiliation,<sup>87</sup> these scientists found that disgust sensitivity was highly predictive of political conservatism in general and of conservative attitudes toward a range of ideological issues in particular. The authors found strong associations between disgust and politics; in particular, and of particular interest for this Article, the strongest association was between disgust and abortion opposition.<sup>88</sup> Combined, these findings suggest that disgust plays a formative role in determining our political orientations in general and our ideological attitude toward abortion in particular.<sup>89</sup>

Other studies of the relationship between disgust sensitivity and moral judgment have made similar findings. In one, scientists found that “the primary political attitudes affected by disgust sensitivity are those pertaining to sex/reproduction,” including pornography, abortion rights, premarital sex, and gay marriage.<sup>90</sup> As in the previous study, here, people with heightened disgust sensitivity were significantly more likely to oppose abortion, even controlling for age and gender. In fact, after controlling for age and gender, abortion opposition was the political attitude relating to sex and reproduction

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gust and political ideology — that is, whether a *general disposition* to feel disgusted by a variety of stimuli, including non-social stimuli, is associated with conservatism.” *Id.* at 716. Its authors predicted — correctly — that “a general disposition to feel disgust in a variety of situations would be associated with greater self-reported conservatism as well as more conservative views on specific political issues.” *Id.* The authors of the 2009 study have published more recent studies that similarly demonstrate that “political conservatives are especially likely to disapprove of acts and individuals that violate norms of sexual and bodily purity.” Yoel Inbar et al., *Disgust Sensitivity, Political Conservatism, and Voting*, 3 SOC. PSYCHOL. & PERSONALITY SCI. 537, 537 (2012) [hereinafter Inbar, *Disgust Sensitivity*].

<sup>85</sup> Inbar et al., *More Easily Disgusted*, *supra* note 84, at 723.

<sup>86</sup> *See id.* at 721.

<sup>87</sup> That is, the study’s authors regressed disgust sensitivity scores and religious affiliation on conservatism to test whether the relationship between disgust sensitivity and conservatism could be explained by subjects’ religious affiliation. In so doing, they found that while “[r]eligious affiliation of any kind (as opposed to atheism/agnosticism) significantly predicted conservatism . . . disgust sensitivity remained a significant predictor as well.” *Id.* at 718. Thus, they concluded, “religious affiliation does not appear to explain the relationship between disgust sensitivity and conservatism.” *Id.*

<sup>88</sup> *See id.* at 721 (summarizing data showing that “disgust sensitivity was related to a greater disapproval of gay marriage and greater disapproval of abortion”).

<sup>89</sup> *See id.* at 723.

<sup>90</sup> Kevin B. Smith et al., *The Ick Factor: Disgust Sensitivity as a Predictor of Political Attitudes* 14–15 (Apr. 2008) (unpublished paper), available at <http://languagelog ldc.upenn.edu/myl/SmithDisgust2009.pdf>.

that correlated most strongly with a particular kind of disgust sensitivity tested.<sup>91</sup>

In another study, individuals high in disgust sensitivity exhibited “more negative intuitive moral evaluations of gay people and same-gender sexual behavior” than did individuals low in disgust sensitivity.<sup>92</sup> People who were prone to experiencing disgust were also prone to making “harsher [intuitive] judgments” about sexual minorities.<sup>93</sup> That study tested only the relationship between disgust sensitivity and intuitive disapproval of gay people, not abortion. Nevertheless, its findings are interesting to consider in the abortion context because they suggest that people who experience disgust quite easily will intuitively judge purity-related offenses like abortion with more severe moral condemnation than will people who are less disgust-sensitive.<sup>94</sup> As the study’s authors put it, “[c]hronically experiencing disgust . . . may make individuals chronically harsh moral judges.”<sup>95</sup>

These studies lend support to the proposition that the emotion of disgust might influence abortion opposition and its resultant laws. As such, they contribute to scientists’ growing interest in the possibility that disgust *causes* moral condemnation of certain behaviors, including abortion.<sup>96</sup> Admittedly,

<sup>91</sup> *Id.* at 27 tbl.2; see also Kevin B. Smith et al., *Disgust Sensitivity and the Neurophysiology of Left-Right Political Orientations*, 6 PLoS ONE 1, 1 (2011) (summarizing similar research); John A. Terrizzi, Jr. et al., *Disgust: A Predictor of Social Conservatism and Prejudicial Attitudes Toward Homosexuals*, 49 PERS. & INDIV. DIFFERENCES 587, 590–91 (2010) (demonstrating a very high correlation between disgust sensitivity and the political opinion that “[a]bortion should be illegal,” and stating that while “disgust sensitivity was not predictive of conservative political attitudes across the board,” it was predictive “of socially conservative political beliefs such as immigration, abortion, euthanasia, stem cell research, medical marijuana, and homosexual marriage”).

<sup>92</sup> Yoel Inbar et al., *Disgust Sensitivity Predicts Intuitive Disapproval of Gays*, 9 EMOTION 435, 438 (2009).

<sup>93</sup> *Id.*

<sup>94</sup> Inbar et al., *More Easily Disgusted*, *supra* note 84, at 714 (describing abortion as a “purity-related” issue); see also E.J. Horberg et al., *Disgust and the Moralization of Purity*, 97 J. PERSONALITY & SOC. PSYCHOL. 963, 972 (2009) (arguing that disgust is “uniquely associated with the moralization of purity concerns,” and that “purity judgments [are] related only to disgust” — as opposed to other emotions like anger or sadness).

<sup>95</sup> Inbar et al., *supra* note 92, at 438. In the most recent, and so far the largest, study on the relationship between disgust sensitivity and political orientation, psychologists found that “the relationship between DS [(‘disgust sensitivity’)] and conservatism held when controlling for a number of individual-difference variables, including gender, age, education, religious affiliation, and [religious] attendance.” Inbar et al., *Disgust Sensitivity*, *supra* note 84, at 542. That study found that disgust sensitivity was a significant predictor not only of conservative political attitudes, but also of conservative political behavior. For example, among the 25,588 individuals surveyed, those who showed the highest disgust sensitivity “were more likely to report planning to vote for John McCain over Barack Obama” in the 2008 presidential election. *Id.* at 540.

<sup>96</sup> Since the 1990s, moral and social psychologists working in the area of disgust have experimentally tested at least three claims: first, whether individuals feel disgust as a consequence of moral violations; second, whether individuals’ disgust intensifies the severity of their moral judgments; and third, whether individuals’ disgust actually causes them to view certain behaviors as immoral. See generally D.A. Pizarro et al., *On Disgust and Moral Judgment*, 3 EMOTION REV. 267 (2011) (describing these claims). They have found strong experimental support for the first two claims, and “promising” experimental support for the third. *Id.* That

the studies here summarized do not directly measure whether people find abortion disgusting or whether people believe that abortion should be illegal because they find it disgusting; nor do they definitively establish a causal relationship between disgust and morality.<sup>97</sup> They do show, however, that the emotion of disgust is highly predictive of our political orientations generally and of our ideological position toward abortion specifically. Moreover, they establish a sufficiently strong correlation between disgust sensitivity and abortion opposition to suggest that disgust likely plays some kind of role in shaping abortion opposition and its attendant laws — opposition not just to a particular type of abortion (like D&X), but to abortion generally.<sup>98</sup>

In addition to finding a strong correlation between disgust sensitivity and abortion opposition, researchers have also found a weak correlation between harm concerns and abortion opposition. For instance, a 2012 study found that concerns about disgust and purity were more significant

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is, experiments overwhelmingly show that people tend to feel disgust when moral violations occur (claim one), and that disgust “makes wrong things seem *even more* wrong” (claim two). *Id.* But experiments also suggest that disgust might *cause* individuals to view certain behaviors as wrong — that is, that individuals label certain behaviors immoral *because* they find those behaviors to be disgusting (claim three). *Id.* For studies on the possible causal relationship between disgust and moral judgment, see generally HERZ, *supra* note 36; Horberg et al., *supra* note 94; Yoel Inbar et al., *Disgusting Smells Cause Decreased Liking of Gay Men*, 12 EMOTION 23 (2012); Andrew Jones & Julie Fitness, *Moral Hypervigilance: The Influence of Disgust Sensitivity in the Moral Domain*, 8 EMOTION 613 (2008); Simone Schnall et al., *Disgust as Embodied Moral Judgment*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1096 (2008); Thalia Wheatley & Jonathan Haidt, *Hypnotic Disgust Makes Moral Judgments More Severe*, 16 PSYCHOL. SCI. 780 (2005). The third claim (disgust drives moral judgment) is the converse of the first (disgust follows moral judgment).

<sup>97</sup> See Inbar et al., *More Easily Disgusted*, *supra* note 84, at 723 (recognizing that the present study did not “speak to [a] causal relationship between political attitudes and disgust sensitivity”). Nevertheless, the authors of one study maintain that it is unlikely that the relationship works the other way (that is, that political views drive disgust sensitivity), given that disgust is “a basic emotion that emerges long before individuals form political attitudes.” *Id.* If anything, it seems more likely that disgust, along with a host of other variables (including geographical location), guides one’s political orientation. See *id.*

<sup>98</sup> As to this latter point, consider what exactly the studies are measuring when they establish an association between disgust and abortion opposition. One study measured abortion opposition by asking participants to rate the extent to which they agreed with the statement that “[a] woman should have the right to choose what to do with her body, even if that means getting an abortion,” Inbar et al., *More Easily Disgusted*, *supra* note 84, at 724 app.1, using a seven-point scale that ranged from “completely disagree” to “completely agree.” *Id.* at 719. Another study measured abortion opposition by asking participants to rate themselves on a five-point scale that ranged from “1” (or abortion is “morally acceptable in most or all cases”) to “5” (or abortion is “morally wrong in most or all cases”). Terrizzi, Jr. et al., *supra* note 91, at 590. Using this system, both studies found a significant positive association between disgust sensitivity and “greater disapproval of abortion.” Inbar et al., *More Easily Disgusted*, *supra* note 84, at 721. By “greater disapproval of abortion,” these studies likely capture more individuals than just those who currently support abolishing the abortion right entirely. Moreover, they likely capture “disapproval” for more than just D&X abortion. This observation is significant because it suggests that disgust is playing a role not just in the D&X context and not just for those Americans who oppose abortion in every circumstance. Rather, or in addition, disgust is playing a role in other contexts and for other individuals as well. Whereas *Gonzales* suggests that the Court is willing to sanction disgust *in law*, even outside the D&X context (Justice Ginsburg’s prediction), these studies suggest that many individuals actually feel disgust *in fact* outside that context.

predictors of individuals' abortion opposition than either concerns about harm or an individual's political orientation (i.e., the fact that someone self-identified as either liberal or conservative).<sup>99</sup> The authors of that study used moral foundations theory — the theory that “human groups construct moral virtues, meanings, and institutions in variable ways by relying, to varying degrees, on five innate psychological systems,”<sup>100</sup> including harm/care, fairness/reciprocity, in-group/loyalty, authority/respect, and purity/sanctity — to determine the role that moral intuitions play, above and beyond political affiliation and ideology, in driving individuals' culture war positions. They found that the purity intuition, which is “based on the emotion of disgust,”<sup>101</sup> was “the best foundation predictor of endorsing stricter abortion laws.”<sup>102</sup>

More specifically, subjects whose morality was shaped primarily by purity/disgust concerns, as determined by subjects' responses to a “Moral Foundations Questionnaire” (“MFQ”),<sup>103</sup> were significantly more likely to oppose abortion than those whose morality was shaped by a different moral foundation, such as harm/care or fairness/reciprocity. In fact, the purity/disgust moral foundation was a more significant predictor of abortion opposition than were numerous other factors, including political orientation, interest in politics, age, gender, and religious attendance. With respect to the harm moral foundation factor specifically, the study's authors found that moral disapproval for abortion “was far better predicted by Purity than by Harm scores [on the MFQ].”<sup>104</sup>

The low correlation between harm concerns and abortion opposition was notable to the study's authors, who pointed out that the “political rhetoric about the morality of abortion . . . is often dominated by arguments about (potential) harm,”<sup>105</sup> whether harm to the fetus or harm to the woman seeking an abortion.<sup>106</sup> Contrary to this rhetoric, they argue, harm prevention

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<sup>99</sup> Spassena P. Koleva et al., *Tracing the Threads: How Five Moral Concerns (Especially Purity) Help Explain Culture War Attitudes*, 46 J. RES. PERSONALITY 184, 188 (2012).

<sup>100</sup> *Id.* at 185. Jonathan Haidt has used moral foundations theory to help explain the stark differences between liberals and conservatives — and particularly those on the extreme ends of those two political orientations — on various culture war positions. Through a series of experiments, he has shown that liberals, and especially extreme liberals, rely almost exclusively on the harm and fairness foundations when making moral judgments. By contrast, conservatives, and especially extreme conservatives, rely on all five foundations (harm, fairness, in-group, authority, and purity/disgust) when making those judgments. *See generally* Graham et al., *supra* note 84; Haidt & Graham, *supra* note 84 (discussing the importance of disgust as a moral intuition for conservatives); Haidt & Hersch, *supra* note 84. Haidt has summarized this research in a recently published book. *See generally* JONATHAN HAIDT, *THE RIGHTIOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

<sup>101</sup> Koleva et al., *supra* note 99, at 185.

<sup>102</sup> *Id.* at 189.

<sup>103</sup> The MFQ has been widely used by moral psychologists to measure “the extent to which an individual endorses each of five types of moral concerns.” *Id.* at 186.

<sup>104</sup> *Id.* at 188.

<sup>105</sup> *Id.*

<sup>106</sup> *See, e.g.,* Siegel, *Dignity and the Politics of Protection*, *supra* note 3, at 1706; Siegel, *supra* note 32, at 992 (citing abortion opponents' concerns “about protecting women as well as the unborn”).

“may sometimes be only loosely connected to the intuitions that motivated the [anti-abortion] attitude in the first place.”<sup>107</sup>

But the low correlation between harm concerns and abortion opposition is notable for another reason that the study’s authors did not mention. In *Gonzales*, the Court made clear that harm prevention — specifically, preventing harm to women — was a constitutionally valid justification for restricting the abortion right. *Gonzales*’s harm-prevention rationale was the product of anti-abortion advocacy’s (ultimately successful) use of a woman-protective argument.<sup>108</sup> That argument, which abortion opponents have developed over the past decade, “portrays both the fetus and the woman as victims of abortion providers and the pro-choice movement.”<sup>109</sup> Presumably, opponents advanced that argument, which the *Gonzales* Court embraced, because they were concerned about the extent to which abortion harms women. The study just described, however, suggests that harm might not have been the principal driver of abortion opponents who advanced the woman-protective theory in abortion litigation. In this sense, *Gonzales*’s woman-protective rationale not only rests on questionable science, as its critics have charged,<sup>110</sup> but might also derive from questionable motives.

Again, to be clear, none of the studies described here establishes a causal relationship between disgust and abortion opposition. Thus, we cannot rely on them to say definitively that the emotion of disgust (divorced from harm concerns) drives abortion opposition and restrictive abortion laws. However, the studies do significantly contribute to an established (and still growing) body of experimental work in this area that has demonstrated

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<sup>107</sup> Koleva et al., *supra* note 99, at 188. According to the authors of this study, purity/disgust’s role in driving political ideology more generally is an under-explored, and therefore under-theorized, topic in political science. *See id.* at 188 (“Purity-related concerns, which are largely missing from existing psychological models of political attitudes, should be included in future theorizing and research on the psychological underpinnings of ideology.”). As to the relationship among harm, disgust, and abortion opposition, it could be that abortion opponents initially oppose abortion for reasons not relating to harm — indeed, for reasons relating to disgust, as explained in greater length below — but justify that opposition by adverting to harm. The use of harm — particularly, though not exclusively, by political and social conservatives — as a post-hoc justification for moral judgments precipitated by disgust has been widely acknowledged. *See, e.g.,* Roberto Gutierrez & Roger Giner-Sorolla, *Anger, Disgust, and Presumption of Harm as Reactions to Taboo-Breaking Behaviors*, 7 *EMOTION* 853, 866 (2007) (remarking that “violations of sexual morality elicit presumptions of harm primarily among political conservatives”); Jonathan Haidt et al., *Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?*, 65 *J. PERSONALITY & SOC. PSYCHOL.* 613, 625 (1993) (stating that in all cultures “harm references may sometimes be red herrings”); Dan Kahan, *The Cognitively Illiberal State*, 60 *STAN. L. REV.* 101, 106 (2007) (observing that liberals and conservatives alike “are much more likely to take note of and assign significance to instances of harm associated with behavior we despise than those associated with conduct we revere”). Haidt has developed a “social intuitionist model” to explain post-hoc reasoning of this sort. *See* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814, 817–19 (2001).

<sup>108</sup> *See* Siegel, *Sex Equality Arguments for Reproductive Rights*, *supra* note 3, at 837 (discussing the woman-protective justification in restrictive abortion legislation).

<sup>109</sup> Franklin, *supra* note 14, at 158–59.

<sup>110</sup> *See* Guthrie, *supra* note 8, *passim*.

(1) an extremely strong correlation between disgust sensitivity and negative attitudes toward purity violations like (and including) abortion, (2) the predictive value of disgust sensitivity in the abortion context, and (3) the lack of a relationship between disgust concerns and harm concerns in moral judgment generally and in abortion opposition specifically.

For this reason, this Article makes a more modest and disciplined claim, namely, that disgust *likely* animates abortion opposition and its resultant legal regimes. It also argues, though, that *the mere possibility* that disgust divorced from harm is associated with abortion lawmaking — something that the studies at a minimum show — is reason enough to care about what disgust is doing there and what that disgust might mean, particularly now that disgust is a constitutionally valid basis for abortion regulation. Erring on the side of caution, this Article takes the position that recent empirical work on the abortion-disgust relationship ought to prompt deeper inquiry into what that relationship is all about.

### C. *Disgust Is Troubling (as a Normative Matter) in the Abortion Law Context, but Why?*

Scholars have offered a number of reasons why we ought to remain wary of disgust's role in the law generally and in the abortion context specifically. One reason is that disgust is too subjective an emotion to be a stable and reliable basis for lawmaking.<sup>111</sup> Another is that disgust could lead to "irrational fear mongering"<sup>112</sup> and "seems likely to inflame public sentiment over the issue of abortion — to diminish whatever spirit of moderation remains in America regarding that question."<sup>113</sup> And still another is that disgust flows from feeling, not from logic, thereby "mak[ing] it far easier to assert that we should ban something simply because it feels wrong."<sup>114</sup> As such, disgust lacks "analytic transparency," undermining "much of what is central to a functional democracy — the public availability of justifications and reasoning with respect to the resolution of constitutional matters."<sup>115</sup>

Scholars have missed another reason — perhaps the best reason — why we ought to reject disgust as a valid basis for abortion lawmaking: because disgust signals that gender stereotyping is afoot in abortion regulation, and gender stereotyping violates constitutional law's anti-stereotyping principle. This Article argues that disgust is problematic in the abortion context not

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<sup>111</sup> See Suter, *supra* note 5, at 1584 (stating that disgust "raises the problems of moral relativism of several types: cultural, personal, and temporal"). Suter goes on to note, "[w]hat is repugnant to one culture may not be repugnant to another. What is repugnant to me may not be repugnant to you. And what is repugnant today may not be repugnant tomorrow. Whose repugnance, then, should drive our policymaking or our determination of constitutional rights?" *Id.*

<sup>112</sup> *Id.* at 1583.

<sup>113</sup> Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 1022 (2008).

<sup>114</sup> Suter, *supra* note 5, at 1584–86.

<sup>115</sup> *Id.*

just because of what the emotion of disgust might generally betoken — moral relativism, fear mongering, and analytic opacity; it is also problematic because of what disgust for abortion specifically means. Moral psychology studies show that “disgust correlates with negative attitudes toward putative purity violations,”<sup>116</sup> like abortion. Thus, at the very least, they suggest that disgust likely animates abortion opposition and its resultant laws. They also suggest that disgust for abortion is motivated by something other than harm. But they do not tell us what that “something” is. For this, we must look elsewhere — specifically, to theories of disgust from other social science disciplines, including anthropology and sociology.

As the following Parts show, those two disciplines do not simply establish a relationship between abortion and disgust, they help explain it. Viewing abortion disgust through the theoretical lenses of these disciplines reveals that, far from lacking transparency, disgust’s operation in abortion law tells us quite a bit, and all of it troubling from a constitutional sex equality perspective.

## II. ABORTION DISGUST: A GENEALOGY

The question of what drives abortion disgust is an important one now that we know that disgust not only can play, but also very likely does play and will continue to play a role in abortion law. To answer it, this Part applies the insights of disgust theory to abortion. Section A explains what, in general, disgusts, focusing mainly on the social role theory of disgust for reasons discussed below. Section B then applies the social role theory of disgust to abortion disgust specifically; in so doing, it suggests that abortion provokes disgust because it is thought by some to disrupt gender norms. The genealogy of abortion disgust that this Part uncovers provides the best reason why we ought to be wary of disgust’s role in abortion lawmaking, particularly given that disgust is both a legitimate and a likely basis for it.

### A. *What Disgusts*

Contemporary disgust theorists uniformly argue that “the *raison d’être* for the emotion of disgust” is harm and death avoidance.<sup>117</sup> “[D]isgust is fundamentally about our awareness of our own death and our terror of it,” one theorist recently observed.<sup>118</sup> It “[arises] from our need to protect ourselves from triggers that remind us of this truth.”<sup>119</sup> Such triggers are nu-

<sup>116</sup> Horberg et al., *supra* note 94, at 972.

<sup>117</sup> HERZ, *supra* note 36, at 126; *see also* Paul Rozin et al., *Disgust*, in *HANDBOOK OF EMOTIONS* 637, 642 (Michael Lewis et al. eds., 2000) (stating that “[r]esearch on terror management theory has shown a strong connection between disgust and fear of death,” and that “[t]hese speculations about death lead to an overarching description of disgust elicitors: [a]nything that reminds us that we are animals [and therefore mortal] elicits disgust”).

<sup>118</sup> HERZ, *supra* note 36, at 130.

<sup>119</sup> *Id.*

merous, moreover, and have evolved over time.<sup>120</sup> They now include noxious substances (such as rotting meat, a “core disgust” elicitor);<sup>121</sup> body envelope violations (such as gore and maiming, two “animal-nature disgust” elicitors);<sup>122</sup> and strangers and their potential contaminants (an “interpersonal disgust” elicitor).<sup>123</sup>

Disgust is more than just a response to death and its myriad elicitors, however. It is also a response to non-harmful behaviors that violate social boundaries and that deviate from cultural norms. Indeed, moral psychologists are intrigued by the fact that disgust elicitors now include socially unacceptable behavior that is completely harmless.<sup>124</sup> As two scholars recently put it, “[m]oral misdeeds that do not involve any literal threat of contamination seem to be reliable elicitors of the very same disgust emotion that was once probably only elicited by contaminants like feces and rotting meat.”<sup>125</sup> For psychologists, this idea of “harmless” social disgust is a relatively novel concept. In the words of one leading disgust theorist, “[r]esearch on morality beyond harm . . . is in its infancy.”<sup>126</sup>

But for one of the world’s foremost anthropologists, disgust is *above all else* a response to the transgression of cultural taboos and other socially deviant conduct. The late British anthropologist Mary Douglas famously expounded a social theory of disgust in her seminal work, *Purity and Danger*.<sup>127</sup> Douglas’s social theory of disgust has been enormously influential for legal scholars, who have turned to it to explain countless phenomena, from environmental pollution to animus against gay people.<sup>128</sup> No less influential than her cultural theory of risk,<sup>129</sup> Douglas’s social theory of disgust has influenced the way in which scholars from a number of disciplines — including, but certainly not limited to, the law — conceptualize what disgust is and how it works.

It is no surprise, then, that Professor Martha Nussbaum, among the first legal scholars to bring the insights of disgust theory to bear on the law,<sup>130</sup> has referred to Douglas’s social disgust theory as one of the two “most famous”

<sup>120</sup> See Rozin et al., *supra* note 117, at 644 (stating that the triggers and elicitors of disgust have “been transformed and greatly expanded” over time).

<sup>121</sup> See *id.* at 638.

<sup>122</sup> *Id.* at 642.

<sup>123</sup> See *id.* at 643.

<sup>124</sup> See, e.g., Haidt & Graham, *supra* note 84, at 106 (stating that “in most human societies disgust has become a social emotion”).

<sup>125</sup> Yoel Inbar & David Pizzaro, *Grime and Punishment: How Disgust Influences Moral, Social, and Legal Judgments*, 21 JURY EXPERT 12, 13 (2009).

<sup>126</sup> Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 SCI. 998, 1001 (2007).

<sup>127</sup> DOUGLAS, PURITY AND DANGER, *supra* note 19.

<sup>128</sup> See *supra* notes 23–26.

<sup>129</sup> Douglas’s cultural theory of risk has recently spawned innovative work by legal academics on the relationship between individuals’ cultural worldviews and their perceptions of risk across a variety of legal domains. See, e.g., Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003) (applying Douglas’s cultural theory of risk to attitudes about gun control).

<sup>130</sup> Nussbaum, “*Secret Sewers of Vice*,” *supra* note 9.



theories of disgust.<sup>131</sup> She observes that Douglas's theory, which sees disgust as a response to the "violation of socially imposed boundaries,"<sup>132</sup> has done "important work in making us aware of social factors surrounding disgust."<sup>133</sup> More recently, Professor Suzanne Goldberg has reminded us that "Mary Douglas was the first to analyze systematically the ways in which human fears of impurity, contagion, and pollution undergird social taboos."<sup>134</sup>

Most important for this Article's purposes, though, is the fact that Douglas's social theory of disgust helps elucidate why people might find even harmless behavior to be disgusting (the question that moral psychologists have only just begun to test experimentally), as well as why abortion might be a source of disgust for some people even apart from harm concerns (as illustrated by the empirical findings discussed earlier). Her theory, then, is not only enormously influential. It also has an explanatory power that supplements moral psychology's intriguing — though incomplete — insights on disgust.

Douglas's social role theory of disgust begins with the recognition that nothing is inherently disgusting. Rather, disgust — or what she calls "dirt" — is a response to "matter out of place."<sup>135</sup> Resisting the notion of "absolute dirt," Douglas argues that dirt is an idea rather than a thing.<sup>136</sup> "For us [moderns]," she explains, "dirt is a kind of compendium category for all events which blur, smudge, contradict, or otherwise confuse accepted classifications. The underlying feeling is that a system of values which is habitually expressed in a given arrangement of things has been violated."<sup>137</sup>

Douglas's definition of dirt and "defilement"<sup>138</sup> is only loosely connected, if at all, to actual dirt. Rather, Douglas's conception of that which disgusts or "pollutes"<sup>139</sup> is broad and capacious, a "compendium cate-

<sup>131</sup> NUSSBAUM, HIDING FROM HUMANITY, *supra* note 9, at 91.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Goldberg, *supra* note 25, at 1388–89.

<sup>135</sup> DOUGLAS, PURITY AND DANGER, *supra* note 19, at 44.

<sup>136</sup> DOUGLAS, IMPLICIT MEANINGS, *supra* note 19, at 109.

<sup>137</sup> *Id.*

<sup>138</sup> DOUGLAS, PURITY AND DANGER, *supra* note 19, at 30–42 (introducing and discussing the concept of "secular defilement").

<sup>139</sup> In *Purity and Danger*, Douglas refers to phenomena that violate cultural norms and social boundaries — what this Article refers to as disgust elicitors — as forms of "pollution" that are subject to pollution rituals. *Id.* at 4 (stating that "pollution ideas relate to social life" and that "some pollutions are used as analogies for expressing a general view of the social order"). While Douglas does not use the word "disgust" in *Purity and Danger* to describe these pollution rituals, she does use that term in subsequent works that summarize her theory first set forth in *Purity and Danger*. For instance, in *A History of Grid and Group Cultural Theory*, Douglas uses terms like pollution, taboo, defilement, and disgust interchangeably. She says:

Not concerned to show that the typical institutions of modern society can be traced in the most exotic societies, I set out to show [in *Purity and Danger*] that the famously primitive concepts of pollution and taboo were with "Us" as much as with "Them." Ritual defilement should be brought under the same rubric as the rituals of

gory”<sup>140</sup> that includes any and all phenomena that “confuse accepted classifications.”<sup>141</sup> In support of that expansive definition, Douglas points out that the idea of dirt is a very old one, older even than our knowledge of bacteriology and disease.<sup>142</sup> For this reason, she submits, something other than “pathogenicity and hygiene” motivates pollution reactions. That something, in her view, is contradiction. She says: “If we treat all pollution behaviour as the reaction to any event likely to confuse or contradict cherished classifications, we can bring two new approaches to bear on the problem: the work of psychologists on perception and of anthropologists on the structural analysis of culture.”<sup>143</sup>

Unlike most contemporary disgust theorists, then, Douglas posits that at its core, disgust is not about harm and death but about “anomaly and ambiguity,”<sup>144</sup> both of which threaten the “social order” and the “cherished classifications” on which it rests.<sup>145</sup> “Dirt avoidance,” she explains, “is a process of tidying up, ensuring that the order in external physical events conforms to the structure of ideas.”<sup>146</sup> Phenomena that confound that structure, she remarks, cause “cognitive discomfort”;<sup>147</sup> as a result, they are either

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spring cleaning and other domiciliary standards of hygiene. I postulated a universal cognitive block against matter out of place. Unclassifiables, I said, provoke cognitive discomfort and reactions of disgust, hence negative attitudes to slime, insects, and dirt in general. It was a Durkheimian thesis: classification underwrites all attempts to co-ordinate activities, anything that challenges the habitual classifications is rejected.

MARY DOUGLAS, A HISTORY OF GRID AND GROUP CULTURAL THEORY 1–2, available at <http://projects.chass.utoronto.ca/semiotics/cyber/douglas1.pdf> (last visited Mar. 15, 2013) [hereinafter DOUGLAS, GRID AND GROUP CULTURAL THEORY].

<sup>140</sup> DOUGLAS, IMPLICIT MEANINGS, *supra* note 19, at 109.

<sup>141</sup> *Id.*

<sup>142</sup> DOUGLAS, PURITY AND DANGER, *supra* note 19, at 44 (observing that “[t]he bacterial transmission of disease was a great nineteenth-century discovery,” but that “our ideas of dirt are not so recent”); *id.* (arguing that “[w]e must be able to make the effort to think back beyond the last 150 years and to analyse the bases of dirt-avoidance, before it was transformed by bacteriology”); *id.* (insisting that we “abstract pathogenicity and hygiene from our notion of dirt”).

<sup>143</sup> DOUGLAS, IMPLICIT MEANINGS, *supra* note 19, at 109; *see also* DOUGLAS, PURITY AND DANGER, *supra* note 19, at 45.

<sup>144</sup> DOUGLAS, PURITY AND DANGER, *supra* note 19, at 47.

<sup>145</sup> *Id.* at 45.

<sup>146</sup> DOUGLAS, IMPLICIT MEANINGS, *supra* note 19, at 111.

<sup>147</sup> DOUGLAS, PURITY AND DANGER, *supra* note 19, at xi (observing the “cognitive discomfort caused by ambiguity”). Douglas’s understanding of the “cognitive discomfort” caused by ambiguous and anomalous phenomena is closely related to social psychology’s theory of cognitive dissonance, to which Douglas herself adverts in *Purity and Danger*. *See id.* at 49. According to that theory, individuals confronted with a reality that deviates from their own belief system feel cognitive dissonance. Uncomfortable with such dissonance, they try to reduce it by engaging in different management strategies, one of which is to reject the deviant element entirely. The theory of cognitive dissonance was first developed by Leon Festinger in 1957. *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE v–viii (1957). As Douglas puts it: “Following the work of Festinger it is obvious that a person, when he finds his own convictions at variance with those of friends, either wavers or tries to convince the friends of their error.” DOUGLAS, PURITY AND DANGER, *supra* note 19, at 49.

placed "into the category of the sacred" or cast out as an "abomination."<sup>148</sup> In sum, according to Douglas's structural scheme, "[s]ocial and cognitive structures create dirt less by assigning something to play that role than as a consequence of categorization itself."<sup>149</sup>

Douglas has used her social role theory of disgust to explain why certain phenomena are considered impure and polluting. In *Purity and Danger*, for instance, she uses that theory to explain the abominations and dietary rules of Leviticus and Deuteronomy, the third and fifth books, respectively, of the Torah. There, the frog is considered clean, whereas the mouse is not.<sup>150</sup> There, the camel, "because it chews the cud but does not part the hoof, is unclean," as is the swine, which "parts the hoof . . . but does not chew the cud."<sup>151</sup> There, "[a]ll winged insects that go upon all fours are an abomination," whereas those that "go on all fours . . . [and] which have legs above their feet, with which to leap upon the earth," are not.<sup>152</sup> And there, water-creatures with fins and scales are clean, whereas "[e]verything . . . that has not fins and scales is an abomination to you."<sup>153</sup>

Douglas notes that these rules have confounded a venerated line of Biblical scholars, with the medieval Jewish philosopher Maimonides characterizing many of them as "devoid of sense," and others arguing that they "are not by any means to be rationalised."<sup>154</sup> In Douglas's view, the rules do make sense, but not because they reflect a concern with "hygiene . . . and instinctive revulsion."<sup>155</sup> Rather, she argues, the Old Testament's injunctions are best understood as an anxiety about things and individuals that do not "conform to the class to which they belong."<sup>156</sup> She says: "[T]he underlying principle of cleanness in animals is that they shall conform fully to their class. Those species are unclean which are imperfect members of their class, or whose class itself confounds the general scheme of the world."<sup>157</sup>

The Old Testament's taboos are primarily a vehicle, albeit a powerful one, through which Douglas transmits her larger theory about all taboos. According to that theory, taboo and disgust are less about physical impurity, harm, and death (if they are about those things at all), and more about society's collective reaction against nonconformity. "Taboo protects the local consensus on how the world is organised," Douglas wrote before her death

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<sup>148</sup> DOUGLAS, *PURITY AND DANGER*, *supra* note 19, at 49.

<sup>149</sup> MILLER, *supra* note 9, at 44.

<sup>150</sup> DOUGLAS, *PURITY AND DANGER*, *supra* note 19, at 53.

<sup>151</sup> *Id.* at 52.

<sup>152</sup> *Id.* at 53.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 54.

<sup>155</sup> *Id.* at 62.

<sup>156</sup> *Id.* at 69.

<sup>157</sup> *Id.*

in 2007.<sup>158</sup> If that is true, then it follows that anything that challenges that organization becomes an object of disgust.<sup>159</sup>

Some scholars have criticized Douglas's structural theory of disgust for being overly reductive. "The risk to [her] kind of structuralism," Professor William Miller writes, "is that it ends in reduction and tautology."<sup>160</sup> Many grand theories, though, are reductive and tautological, including the theory that disgust is principally about death and our fear of it. If fear-of-death were disgust's essence, then why are relatively harmless worms disgusting but potentially quite harmful bears and lions not? Moreover, theorizing disgust can be especially difficult in light of disgust's broad range of elicitors, and Douglas's theory has an explanatory power that helps to make sense of many of them, from incest, gay marriage, environmental pollution, and pornography, as legal scholars have already shown,<sup>161</sup> to abortion, as Section B now demonstrates. Her theory helps make "us aware" not only of the "social factors surrounding disgust,"<sup>162</sup> as Nussbaum has argued, but also, and more specifically, of the social factors surrounding disgust for abortion.

### B. *Why Abortion Disgusts*

This section considers why abortion specifically is a source of disgust. Section II.B.1 first addresses (and dispenses with) the argument that abortion provokes disgust because it involves harm/death. Section II.B.2 then argues that a better explanation for abortion disgust may be found in Douglas's role violation theory of disgust.

#### 1. *Abortion Disgust and Harm/Death.*

If "[d]isgust is fundamentally about our awareness of our own death and our terror of it,"<sup>163</sup> then disgust for abortion makes sense as a descriptive matter because for many people, it is a reaction to harm/death. Moreover, if disgust for abortion is a reaction to harm/death, then abortion disgust is morally and legally defensible because it is tied to harm, and harm prevention is widely considered to be a valid basis for regulating conduct in a liberal democratic order. Indeed, according to the Supreme Court in *Lawrence v. Texas*, harm prevention is the only constitutional basis for regulating conduct.<sup>164</sup>

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<sup>158</sup> *Id.* at xi.

<sup>159</sup> See HERZ, *supra* note 36, at 188 (arguing that disgust "is inherently about mess and disorder").

<sup>160</sup> MILLER, *supra* note 9, at 44; see also NUSSBAUM, HIDING FROM HUMANITY, *supra* note 9, at 91 (arguing, inter alia, that Douglas's "idea of anomaly is too weak to explain why we find some things disgusting," and that Paul Rozin's theory of disgust, which is the "most famous theoretical alternative," "seems clearly preferable to Douglas's theory").

<sup>161</sup> See *supra* notes 23–26 and accompanying text.

<sup>162</sup> NUSSBAUM, HIDING FROM HUMANITY, *supra* note 9, at 91.

<sup>163</sup> HERZ, *supra* note 36, at 130.

<sup>164</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (distinguishing between state regulation of harmful and non-harmful conduct). Further, the Court maintains that the state may not

Explaining abortion disgust as a reaction to harm/death is tempting, particularly given the close associations between disgust and death. Nevertheless, there are a number of arguments that harm/death concerns are not the principal motivators for abortion disgust, abortion opposition, and restrictive abortion laws. Consider here four of them.

First, as discussed earlier, empirical research in moral psychology suggests that harm is a notably insignificant predictor for abortion opposition.<sup>165</sup> Recall that psychologists have recently found that people whose morality rests primarily on the purity moral foundation, which “is based on the emotion of disgust,”<sup>166</sup> overwhelmingly disapproved of abortion, whereas people whose morality rests primarily on the other foundations, including the harm foundation, did not. In fact, of all the moral foundations tested, the purity/disgust foundation “was the best foundation predictor of endorsing stricter abortion laws.”<sup>167</sup> The authors of that study remarked that this finding was noteworthy given that the “political rhetoric about the morality of abortion” is so often “dominated by arguments about (potential) harm.”<sup>168</sup>

Numerous other studies have found that harm matters less and that disgust matters more as a moral foundation for self-identified conservatives,<sup>169</sup> the group more likely to oppose abortion.<sup>170</sup> Indeed, self-identified conservatives are significantly more likely than their liberal counterparts to say that disgust alone is a sufficient reason to prohibit certain conduct, especially if that conduct is sexual in nature and even if that conduct is completely harmless.<sup>171</sup> Collectively considered, this research casts doubt on the claim that disgust for abortion is simply a response to abortion’s presumed harmfulness.

Second, while abortion, like the death penalty and the war in Iraq, is thought to involve harm/death, studies indicate that something other than harm/death concerns — or, at the very least, something in addition to harm/death concerns — is fueling opposition to it. For instance, a comparison of views on abortion and the death penalty reveals that most people in the United States are either pro-life and pro-death penalty or pro-choice and pro-death penalty. The smallest average percentage includes those who are pro-life and anti-death penalty and those who are pro-choice and anti-death

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reach non-harmful conduct but may reach harmful conduct, which includes conduct involving “minors[,] . . . persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused[,] . . . public conduct[, and] prostitution.” *Id.*

<sup>165</sup> See *supra* notes 99–107 and accompanying text.

<sup>166</sup> Koleva et al., *supra* note 99, at 185.

<sup>167</sup> *Id.* at 189.

<sup>168</sup> *Id.* at 188.

<sup>169</sup> See *supra* notes 85–102 and accompanying text.

<sup>170</sup> See Lydia Saad, “Pro-Choice” Americans at Record Low — 41%, GALLUP (May 23, 2012), <http://www.gallup.com/poll/154838/Pro-Choice-Americans-Record-Low.aspx> (summarizing a 2012 Gallup poll, which found, among other things, that “the percentage of Republicans identifying as pro-life increas[ed] to 72% from 68% [since] last May, and those identifying as pro-choice dropp[ed] to 22% from 28%”).

<sup>171</sup> See, e.g., Inbar et al., *More Easily Disgusted*, *supra* note 84, at 721.

penalty.<sup>172</sup> If concerns about death were the primary motivator of abortion opponents, one would expect somewhat greater overlap between pro-life views and anti-death penalty views than the numbers suggest. Of course, we might attribute the relatively small overlap between these two categories to the perception of “who” is being “put to death” in each: someone presumed innocent (in the case of abortion) versus someone presumed (and proven) guilty (in the case of the death penalty). Viewed in this light, disgust might be the response to the death of those presumed innocent but not to the death of those presumed guilty.

But consider in this regard a recent publication from the Pew Research Center (“PRC”) indicating that as of 2011, 72% of Republicans supported the use of force in Iraq (presumably notwithstanding evidence of that invasion’s considerable civilian death toll).<sup>173</sup> That same year, Gallup reported that 68% of Republicans identified as “pro-life” on the abortion issue.<sup>174</sup> These statistics suggest that it is not the death of innocent life that is the core source of abortion opposition but rather the death of innocent life that takes place in a certain context and under certain conditions. At the very least, they suggest that the lack of a significant overlap between abortion opposition and death penalty opposition is not necessarily, or not only, due to the fact that “innocent” life is implicated in one and “guilty” life in the other. “While a deep concern for sacred human life may be the most acceptable and humanitarian justification for opposing abortion,” one scholar writes, “there is considerable empirical evidence casting doubt on this justification.”<sup>175</sup> Indeed, “the notion that opposition to abortion represents a more generalized pro-life orientation [has] received no support” in the empirical literature dealing with the subject.<sup>176</sup>

Moreover, even assuming there was significant overlap among abortion opposition, death penalty opposition, and war opposition, studies suggest that opposition to those issues likely comes from different sources. Abortion opposition correlates with disgust. Opposition to other harm/death-related issues, however, does not. For instance, one study found that opposition to

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<sup>172</sup> See KIMBERLY COOK, *DIVIDED PASSIONS: PUBLIC OPINIONS ON ABORTION AND THE DEATH PENALTY* 67 (1998) (showing that over a seventeen-year period (1977–1994) an average of 33% of Americans identified as pro-life and pro-death penalty, 45% as pro-choice and pro-death penalty, 10% as pro-life and anti-death penalty, and 10% as pro-choice and anti-death penalty); see also Kimberly J. Cook, *A Passion to Punish: Abortion Opponents Who Favor the Death Penalty*, 15 JUST. Q. 329 (1998) (discussing the possible reasons for the pro-life/pro-death penalty position).

<sup>173</sup> *Iraq and Public Opinion: The Troops Come Home*, PEW RESEARCH CTR. (Dec. 14, 2011), <http://pewresearch.org/pubs/2145/iraq-background-the-troops-come-home> (finding that as of 2011, “72% of Republicans support the decision to use force [in Iraq] compared with just 44% of independents and 37% of Democrats”).

<sup>174</sup> Lydia Saad, *Republicans More Unified than Democrats on Abortion*, GALLUP (June 6, 2011), <http://www.gallup.com/poll/147941/republicans-unified-democrats-abortion.aspx>.

<sup>175</sup> COOK, *supra* note 172, at 57.

<sup>176</sup> Donald Granberg, *Pro-Life or Reflection of Conservative Ideology? An Analysis of Opposition to Legalized Abortion*, 62 SOC. & SOC. RES. 414, 475 (1978).

the death penalty, to the war in Iraq, and to bombing Iran correlated weakly with disgust sensitivity (and, in the case of the death penalty, quite weakly).<sup>177</sup> It determined that whereas disgust sensitivity significantly predicted moral disapproval of abortion, it did not significantly predict opposition to those three other issues. Another study found that the disgust/purity moral foundation correlated negatively with moral disapproval for the death penalty, meaning that the more disgust-sensitive an individual was, the more likely she was to *support* the death penalty.<sup>178</sup> In addition, it found that of all the variables tested — age, gender, religion, harm concerns, disgust concerns — harm, not disgust, was the most significant predictor of moral disapproval for the death penalty.<sup>179</sup>

Even assuming, then, a situation where everyone who opposed abortion also opposed the death penalty and the war in Iraq, the studies still suggest that abortion opposition comes from a very different place than opposition to those other harm/death-related issues.

Third, even those abortion regulations that seem to be most concerned about harm bear but a remote relationship to harm prevention, leading one to wonder what motivates most abortion regulation. For instance, the fetal pain laws discussed earlier capture just 1% of all abortions performed in the United States annually.<sup>180</sup> Such “figures suggest that the legislation’s very slight, practical impact on abortion procedures within [a] state could not by itself have justified the legislation’s passage.”<sup>181</sup> According to Professor Amanda Pustilnik, the real motivation for such laws is “repugnance to abortion — not the issue of fetal pain itself.”<sup>182</sup> Similarly, the abortion procedure at issue in *Gonzales v. Carhart* — so-called “partial birth,” or D&X, abortion — was exceedingly rare even before it was outlawed in 2003. In 2000, for instance, D&X abortions accounted for just 0.2% of all abortions performed that year.<sup>183</sup> Thus, likely for these reasons, Judge Richard Posner has commented that the entire D&X controversy was “[w]hipped up by activists who wanted to dramatize the ugliness of abortions” generally.<sup>184</sup>

If Professor Pustilnik and Judge Posner are right, then fetal pain and D&X legislation raise the strong possibility that something other than a concern about harm prevention is motivating abortion opposition and its attendant regulation. Indeed, if harm is not the principal motivator for abortion laws that address issues that on their surface seem so directly linked to harm (fetal pain, D&X), then what does this say about harm’s role in abortion laws

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<sup>177</sup> See Inbar et al., *More Easily Disgusted*, *supra* note 84, at 721 tbl.1.

<sup>178</sup> See Koleva et al., *supra* note 99, at 187 tbl.2.

<sup>179</sup> See *id.* at 188 tbl.3.

<sup>180</sup> Pustilnik, *supra* note 79, at 843.

<sup>181</sup> *Id.* at 844.

<sup>182</sup> *Id.* at 843.

<sup>183</sup> See Rovner, *supra* note 43.

<sup>184</sup> *Hope Clinic v. Ryan*, 195 F.3d 857, 880 (7th Cir. 1999) (Posner, C.J., dissenting), *vacated*, 530 U.S. 1271 (2000).

that address issues whose relationship to harm are considerably more attenuated?<sup>185</sup>

Fourth, the vast majority of Americans — Democrats, Independents, and Republicans alike — support abortion in cases where the pregnancy was the result of rape or incest. For instance, according to a CNN poll conducted in August 2012, 90% of Democrats, 81% of Independents, and 76% of Republicans responded that abortion should be “legal” when “the pregnancy was caused by rape or incest.”<sup>186</sup> Given that a 2012 Gallup poll found that 72% of Republicans identified as “pro-life,”<sup>187</sup> one can assume that for many Republicans, being “pro-life” means supporting abortion at least some of the time, depending on the conditions under which the pregnancy occurred. The point here is that if concerns about harm prevention were abortion opponents’ primary concern, then one would not expect so many opponents to forgo such concerns in particular contexts, like rape and incest. The fact that they often do suggests that harm prevention is not their principal motivation for opposing abortion.<sup>188</sup>

## 2. *Abortion Disgust and Social Role Violation.*

If abortion disgust is not principally a reaction to harm/death, then what is it a reaction to? This subsection’s central argument is this: for many people, abortion provokes disgust not because of harm but because it represents women engaging in gender-atypical behavior.

Douglas theorized that at their core, reactions of disgust are reactions against “anomaly.” Anomalous things are things that do not “conform to the class to which they belong”<sup>189</sup> or that constitute “imperfect members of their class”<sup>190</sup> because they do not act like typical class members. For Douglas, nothing is inherently dirty (or disgusting) and nothing is instinctively repulsive. Rather, disgust and repulsion are contextual and relative; they are

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<sup>185</sup> Such laws include targeted regulations of abortion providers (“TRAP laws”). While TRAP laws vary by state, “in general they impose licensing requirements, authorize state inspections, regulate wide-ranging aspects of abortion providers’ operations — including, for example, staff qualifications and minimum hallway dimensions — and impose civil and criminal penalties for noncompliance.” Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 871 (2007).

<sup>186</sup> See *Abortion and Birth Control*, POLLING REP., <http://www.pollingreport.com/abortion.htm> (last visited Nov. 25, 2012).

<sup>187</sup> Saad, *supra* note 170 (reporting this figure).

<sup>188</sup> See, e.g., Jack Balkin, *Judgment of the Court, in WHAT ROE V. WADE SHOULD HAVE SAID* 31, 49 (Jack M. Balkin ed., 2005) (arguing that rape exemptions suggest “that the state’s interest in the fetus is strongly connected to beliefs about maternal responsibility — that women who are victims of statutory or forceable rape are not responsible for engaging in sexual intercourse that led to their pregnancy”); Reva B. Siegel, *Concurring Opinion, in WHAT ROE V. WADE SHOULD HAVE SAID, supra*, at 63, 77 (arguing that the “statutory exemption allowing women to have abortions if they conceive by rape indicates that the state’s decision to prohibit abortion rests on unarticulated assumptions about how women are to comport themselves sexually — a code the state enforces by selectively allowing women access to abortion”).

<sup>189</sup> DOUGLAS, PURITY AND DANGER, *supra* note 19, at 67.

<sup>190</sup> *Id.* at 69.



reactions to behaviors and individuals that violate cultural norms and social roles, and thereby challenge “how the world is organised.”<sup>191</sup> As another prominent social scientist has written, “[t]he pure will be that which conforms to an established taxonomy; the impure, that which unsettles it.”<sup>192</sup> We like the world to be “tidy” and organized, Douglas insists,<sup>193</sup> and when anything “confus[es] accepted classifications”<sup>194</sup> and “contradict[s] cherished classifications”<sup>195</sup> it “provoke[s] cognitive discomfort and reactions of disgust.”<sup>196</sup>

The idea that women, and especially pregnant women,<sup>197</sup> would renounce motherhood elicits disgust because that renunciation exemplifies women’s failure to conform to the “class to which they belong.”<sup>198</sup> “[N]o woman achieves her full position in society until she gives birth to a child,” Professor Dorothy Roberts writes.<sup>199</sup> “Being a mother is women’s major social role.”<sup>200</sup> As the Supreme Court observed in its most recent constitutional sex equality case, the “prevailing ideology about women’s roles” in American history is “that women are mothers first.”<sup>201</sup> Indeed, traditionally speaking, women’s “contributions to the nation were defined principally in relation to . . . motherhood.”<sup>202</sup>

If becoming a mother is “women’s major social role,” then it follows that choosing not to become one, *particularly when given the opportunity to do so*, constitutes an anomaly; according to Douglas’s role-violation theory, such conduct is an abomination. Like the water-creature without fins or scales, the pregnant woman who rejects the motherhood that society presumes she inhabits by virtue of being pregnant is deeply unsettling.<sup>203</sup>

<sup>191</sup> *Id.* at xi.

<sup>192</sup> JULIA KRISTEVA, *POWERS OF HORROR: AN ESSAY ON ABJECTION* 98 (Leon S. Roudiez trans., 1982).

<sup>193</sup> DOUGLAS, *PURITY AND DANGER*, *supra* note 19, at 5.

<sup>194</sup> *Id.* at 45.

<sup>195</sup> *Id.*

<sup>196</sup> DOUGLAS, *GRID AND GROUP CULTURAL THEORY*, *supra* note 139, at 1.

<sup>197</sup> Abortion is an object of stigma and disgust in a way that other reproductive decisions, including the decision to forgo having children or to use contraception, are not. *See* Kumar et al., *supra* note 29, at 627 (stating that “[u]nlike other behaviours that confound expectations of women as mothers (e.g., choosing to remain childless or using contraceptives), a woman who terminates a pregnancy often defies long-held ideals of subordination to community needs”). As of 2012, an overwhelming majority of Americans — 89% — believes that contraception is “morally acceptable.” Frank Newport, *Americans, Including Catholics, Say Contraception is Morally OK*, GALLUP (May 22, 2012), <http://www.gallup.com/poll/154799/americans-including-catholics-say-birth-control-morally.aspx>. By contrast, as of 2012, a majority of Americans morally disapproves of abortion. *See* Saad, *supra* note 170.

<sup>198</sup> DOUGLAS, *PURITY AND DANGER*, *supra* note 19, at 67.

<sup>199</sup> Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 96 (1993).

<sup>200</sup> *Id.*

<sup>201</sup> *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (internal quotation marks and citation omitted).

<sup>202</sup> Franklin, *supra* note 14, at 155.

<sup>203</sup> In *Gonzales v. Carhart*, Justice Kennedy’s majority opinion repeatedly collapses pregnancy into motherhood in a way that suggests that merely being pregnant makes one a mother. *See* 550 U.S. 124 (2007). Indeed, according to the majority, motherhood continues even after

Her behavior causes “cognitive discomfort,”<sup>204</sup> if not extreme cognitive dissonance, because it “confounds the general scheme of the world.”<sup>205</sup>

The role violation theory of abortion disgust offered here finds strong support in at least three different sources: recent sociological analyses of abortion stigma; historical accounts of abortion regulation; and *Gonzales v. Carhart* itself. Each demonstrates that abortion provokes discomfort, opposition, and disgust principally because it represents women acting contrary to deeply rooted cultural conceptions of womanhood and motherhood.

First, consider the relationship between gender nonconformity and “abortion stigma.”<sup>206</sup> As sociologist Erving Goffman well understood, stigma both reflects and reproduces disgust; the two, he observed, exist in a feedback loop.<sup>207</sup> An examination of “abortion stigma” is therefore simultaneously an examination of abortion disgust.

Sociologists have argued that “abortion stigma — rather than a universal truth — is a social phenomenon that is constructed and reproduced locally through various pathways.”<sup>208</sup> In many cultures,

a woman who seeks an abortion is inadvertently challenging widely-held assumptions about the “essential nature” of women . . . . To choose to avert a specific birth, counters prevailing views of women as perpetual life givers and asserts women’s moral autonomy in a way that can be deeply threatening. Women, who seek induced abortions . . . may be perceived as challenging the inescapability of maternity and defying reproductive physiology.<sup>209</sup>

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an abortion. *See id.* at 159 (describing “a mother who comes to regret her choice” to terminate a pregnancy).

<sup>204</sup> DOUGLAS, PURITY AND DANGER, *supra* note 19, at xi.

<sup>205</sup> *Id.* at 69. It is worth noting that the woman who terminates a pregnancy is an anomaly for two interrelated reasons. Douglas explains that anomalous phenomena are phenomena that do “not fit a given set or series,” that is, phenomena that do not conform to their class. *Id.* at 47. But anomalous phenomena can also be phenomena that partake of two categories simultaneously. *See id.* The best example of this latter sense of anomaly is the penguin, which “flies” underwater; as such, the penguin is simultaneously like a bird and like a fish. Women who have abortions are anomalous in both of these ways. First, they are anomalous because they do not act the way in which most women, and all pregnant women, presumptively act; as such, they are imperfect members of their class. Second, they are anomalous because their refusal to become mothers makes them seem like persons who partake of two categories, female and male. While biologically female, such women are nevertheless acting like men by deviating from “women’s major social role” of having children.

<sup>206</sup> Kumar et al., *supra* note 29, at 626; *see also* Anu Kumar & Leila Hessini, *Legislating Abortion Stigma*, HUFFINGTON POST (Feb. 19, 2011, 2:20 PM), [http://www.huffingtonpost.com/anu-kumar/legislating-abortion-stig\\_b\\_825275.html](http://www.huffingtonpost.com/anu-kumar/legislating-abortion-stig_b_825275.html) (discussing the myriad ways in which the law has recently “institutionalized” abortion stigma, including the enactment of mandatory ultrasound laws).

<sup>207</sup> *See* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 3 (1963) (noting that stigma is an “attribute that is deeply discrediting,” one which spoils or taints one’s identity); *see also* Richard J. Arneson, *Shame, Stigma, and Disgust in the Decent Society*, 11 J. ETHICS 31 (2007) (discussing this relationship).

<sup>208</sup> Kumar et al., *supra* note 29, at 628.

<sup>209</sup> *Id.*

In other words, “[t]he power dynamics that underline abortion [stigma] are part of an ideological struggle about the meaning of family, motherhood and sexuality.”<sup>210</sup> As one study on abortion stigma put it, “[a]bortion . . . is stigmatized because it is evidence that a woman has had ‘nonprocreative’ sex and is seeking to exert control over her own reproduction and sexuality, both of which threaten existing gender norms.”<sup>211</sup> Or, as Professor Jack Balkin has recently argued, “[s]ociety places shame and stigma on women” who give up their children through abortion “because they failed at the social role of caring for their children, which is the social meaning of motherhood.”<sup>212</sup>

Viewed in this light, abortion stigma and its related disgust are less about the shame associated with killing another human being than they are about the shame associated with conduct that defies deeply rooted beliefs about women’s social and biological roles. According to Professor Cass Sunstein, even to equate abortion with a killing — and therefore to locate abortion stigma in abortion’s relationship to murder — is to engage in sex stereotyping. “Abortion is viewed as a killing, rather than a failure to assist,” he writes, “largely because of constitutionally unacceptable stereotypes about women’s natural or appropriate role.”<sup>213</sup> How else, he asks, can we explain the different social and legal responses to abortion and a “mere refusal to protect”?<sup>214</sup> Whereas parents are neither expected nor “compelled to devote their bodies to the protection of children,” he argues, pregnant women are expected and compelled (after a certain point in the pregnancy) to do just that.<sup>215</sup>

Second, consider the link made by some historians between abortion opposition in the United States and gender role disruption. Most notable in this regard is Professor Kristin Luker, who undertook an influential empirical study of abortion regulation in California over a twenty-year period, from the 1960s to the 1980s.<sup>216</sup> Professor Luker found that abortion’s perceived immorality is a relatively novel concept, and that the principal reason for it is the idea that abortion conflicts with “the traditional belief that women should be wives and mothers *first*.”<sup>217</sup> She notes that nineteenth-century women did not consider abortion, and particularly early abortion, “to be

<sup>210</sup> *Id.*

<sup>211</sup> Alison Norris et al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 WOMEN’S HEALTH ISSUES S49, S51 (2011).

<sup>212</sup> Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 323–24 (2007). On restrictive abortion laws as expressive shaming techniques, see Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women’s Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 291 n.2 (2010) (arguing that “a process of shaming, or moral condemnation, is imposed upon abortion patients by the public, through federal and state abortion laws”).

<sup>213</sup> Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 35 (1992).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 34.

<sup>216</sup> KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 1 (1984).

<sup>217</sup> *Id.* at 161.

morally wrong.”<sup>218</sup> Moreover, for the first sixty years of the twentieth century, abortion was taboo not because it was considered to be tantamount to infanticide, but rather because it was tied to sex, and particularly to non-procreative sex. “[F]or many people,” Luker explains, “abortion was ‘unspeakable’ not because it represented the death of a child but because it represented ‘getting caught’ in the consequences of sexuality. Sex, not abortion, was what people didn’t talk about.”<sup>219</sup>

Most significant here are Luker’s findings with respect to the modern abortion debate, which for the purposes of her study extended into the mid-1980s. Luker found that that debate “is so passionate and hard-fought *because it is a referendum on the place and meaning of motherhood*.”<sup>220</sup> She writes:

The abortion debate has become a debate among women . . . . How the issue is framed, how people think about it, and, most importantly, where the passions come from are all related to the fact that the battlelines are increasingly drawn (and defended) by women. While on the surface it is the embryo’s fate that seems to be at stake, the abortion debate is actually about the meanings of *women’s* lives.<sup>221</sup>

Luker shows that pro-choice activists believe that “men and women are substantially equal” and “see women’s reproductive and family roles not as a ‘natural’ niche but as potential barriers to full equality.”<sup>222</sup> Pro-life activists, by contrast, “believe that men and women are inherently different and therefore have different ‘natural’ roles in life.”<sup>223</sup> As she describes the latter group:

[A]bortion is wrong [for pro-life activists] because it fosters and supports a world view that deemphasizes (and therefore *downgrades*) the traditional roles of men and women. Because these roles have been satisfying ones for pro-life people and because they believe this emotional and social division of labor is both “appropriate and natural,” the act of abortion is wrong because it plays havoc with this arrangement of the world.<sup>224</sup>

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<sup>218</sup> *Id.* at 21.

<sup>219</sup> *Id.* at 129. It is important to note, however, that while nineteenth-century *women* might not have considered abortion to be morally wrong, the nineteenth-century *doctors* who pushed for legislation criminalizing contraception and abortion did. As Professor Reva Siegel has shown, those doctors advocated for criminal abortion laws by adverting to arguments about women’s proper roles as mothers. See Siegel, *supra* note 188, at 63, 75.

<sup>220</sup> LUKER, *supra* note 216, at 193.

<sup>221</sup> *Id.* at 193–94.

<sup>222</sup> *Id.* at 176.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 162.

Luker's empirical findings with respect to the modern pro-life movement dovetail with Mary Douglas's structuralist theory of pollution and disgust. Douglas theorized that things and actions are labeled impure and polluting when they "confound[] the general scheme of the world"<sup>225</sup> and thereby challenge the way in which "the world is organised."<sup>226</sup> In this sense, Luker found to be true (at least for abortion) what Douglas had theorized, namely, that extreme "cognitive discomfort" results from something (or from someone) that challenges a deeply rooted "worldview."

Third and last, consider *Gonzales v. Carhart*, the case that established disgust as a legitimate basis for abortion regulation, and in which disgust and gender role concerns are mutually reinforcing. Recall that the *Gonzales* Court upheld the federal D&X ban on the bases of disgust and maternal regret, the latter of which rests on two assumptions. The first assumption is that pregnant women are not only mothers but also naturally maternal. In the Court's words, the "bond of love the mother has for her child" represents the "ultimate expression" of "[r]espect for human life."<sup>227</sup> The second assumption is that given the strong mother/child bond, a woman who undergoes a D&X abortion might "come to regret [her] choice to abort the infant life [she] once created and sustained."<sup>228</sup> "It is self-evident," the majority asserts, "that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form."<sup>229</sup>

The *Gonzales* majority's excursus on maternal love and regret has baffled scholars, some of whom have described it as "jarring" and "inexplicable."<sup>230</sup> As one commentator put it, Justice Kennedy's "lapse" into a reverie on maternal love constitutes "an unconnected and completely unsubstantiated reflection about motherhood."<sup>231</sup>

How might we explain the majority opinion's "jarring" juxtaposition of disgust-driven imagery and rhetoric (i.e., its graphic abortion descriptions) and its "slightly maudlin, highly disputable, yet effectively vapid statement [about maternal love] that is the springboard for the Court's elaboration of its ontology of life, motherhood, and abortion"?<sup>232</sup>

<sup>225</sup> DOUGLAS, PURITY AND DANGER, *supra* note 19, at 69.

<sup>226</sup> *Id.* at xi.

<sup>227</sup> *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

<sup>228</sup> *Id.* at 159.

<sup>229</sup> *Id.* at 159–60.

<sup>230</sup> Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915, 929 (2010).

<sup>231</sup> Laura J. Tepich, *Gonzales v. Carhart: The Partial Termination of the Right to Choose*, 63 U. MIAMI L. REV. 339, 383 (2008).

<sup>232</sup> Bridges, *supra* note 230, at 929 (footnote omitted).

One explanation is that the Court was aware that in 2007 disgust alone was an insufficient constitutional basis to justify governmental action.<sup>233</sup> Under this view, the *Gonzales* majority's principal motivator is disgust, and maternal regret is merely a cover for that disgust.

An alternative explanation suggests that disgust is important in *Gonzales* only to the extent that the perceived disgustingness of D&X abortion exacerbates, or even causes, maternal regret. This explanation sees maternal regret as the Court's principal concern in *Gonzales* and disgust as a subsidiary concern.<sup>234</sup>

Yet a third explanation for the disgust–maternal regret disjuncture posits that neither rationale is subordinate to the other; rather, they are mutually reinforcing. According to it, D&X abortion is disgusting because it “perverts” not just birth but also the “bond of love” between mother and child.<sup>235</sup> Under this view, it is not just that D&X's perceived disgustingness exacerbates maternal regret. It is also that D&X is presumed to be disgusting *precisely because* it so deeply conflicts with the image of maternal love that the majority projects. This Article believes that this is the best explanation for the disgust/maternal regret combination in *Gonzales* because it understands those two variables as reciprocally related.

Professor Terry Maroney has argued that “[t]he disgusting aspect of [the D&X] procedure is regarded as noteworthy [in *Gonzales*] only because it involves destruction of a semi-developed fetus, and this regard reflects a moral valuation . . . of the status and worth of that fetus.”<sup>236</sup> This Article would add only that D&X's disgusting aspect also reflects “a moral valuation” of the pregnant woman, whose actions are especially unsettling given how closely she “approximates motherhood.”<sup>237</sup> The more the fetus looks like a child, the more the woman looks like a mother,<sup>238</sup> and the more the woman looks like a mother, the more anomalous, contradictory, and discom-

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<sup>233</sup> When Kennedy dissented in *Stenberg v. Carhart* in 2000, he did so largely on the basis of disgust — that is, on the basis of D&X's allegedly shocking, gruesome, and inhumane aspects. See 530 U.S. 914, 957–79 (2000) (Kennedy, J., dissenting). In 2003, however, Kennedy rejected morality, and therefore disgust, as a valid constitutional basis for criminal sodomy laws in *Lawrence v. Texas*. See 539 U.S. 558, 577 (2003) (stating that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice” (citation omitted)). By the time Kennedy authored *Gonzales* in 2007, then, he was obviously aware that disgust alone was an insufficient basis for laws like the Partial-Birth Abortion Ban Act.

<sup>234</sup> See, e.g., Suk, *supra* note 63, at 1235 (arguing that under one view, Kennedy's disgust-driven rhetoric was not merely gratuitous but rather shored up the state's interest “in ensuring [that] so grave a choice is well informed” (citation omitted)).

<sup>235</sup> *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007) (describing D&X as a procedure that “perverts a process during which life is brought into the world” (citation omitted)).

<sup>236</sup> Maroney, *supra* note 11, at 900.

<sup>237</sup> Bridges, *supra* note 230, at 930 (arguing that “[w]ithin the [*Gonzales*] majority's metaphysics, when the object of the procedure approximates a child, the woman approximates motherhood”).

<sup>238</sup> See *id.*

fitting — and therefore, according to Douglas, the more repulsive — her actions become.

When considered in this way, *Gonzales's* juxtaposition of disgust and maternalism is not so “jarring” and “inexplicable” after all. To the contrary, it exemplifies the role violation theory of disgust that this Article submits is behind much abortion disgust, not just D&X disgust.

### III. ABORTION DISGUST AND THE ANTI-STEREOTYPING PRINCIPLE

Part I showed that disgust is both a legitimate and a likely basis for abortion regulation — not just of D&X regulation, but of all abortion regulation. Part II then explained what disgust for abortion means. Part III now uses the insights of the previous parts to argue that abortion disgust (and the legal regimes that it underwrites) is problematic from a constitutional sex equality perspective. Section A discusses the anti-stereotyping principle of federal constitutional sex equality law. Section B argues that abortion disgust and its attendant regulations are in tension with that principle.

#### A. Constitutional Law's Anti-Stereotyping Principle

According to the Supreme Court's most recent sex equality jurisprudence, the state commits constitutionally impermissible sex discrimination when it regulates not just female workers and wives but also “mothers or mothers-to-be” in a way that reflects and reproduces gender role stereotypes.<sup>239</sup> The Court's early sex equality jurisprudence rejected as unconstitutional governmental action and reasoning grounded in stereotypes about women's and men's proper roles in employment and in the family. More recently, the Court has extended this anti-stereotyping principle beyond those contexts to other spheres — spheres like reproduction, which were traditionally regarded to be off-limits as far as the Equal Protection Clause was concerned because they ostensibly involved “real differences” between the sexes.

The anti-stereotyping principle has been an indispensable feature of the Court's sex equality jurisprudence for almost forty years. Admittedly, the Court never mentioned sex stereotypes in its 1971 case *Reed v. Reed*,<sup>240</sup> which marked the first time that the Court struck down a sex-based classification as unconstitutional under the Federal Equal Protection Clause. The Court did advert, however, to impermissible sex stereotyping and sex “role-typing”<sup>241</sup> in several other cases decided during this same period.

<sup>239</sup> *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (citation omitted).

<sup>240</sup> 404 U.S. 71 (1971). Professor Franklin has characterized the *Reed* opinion as “spare, even cryptic” — one which “provided almost no explanation for its groundbreaking holding.” Franklin, *supra* note 14, at 125.

<sup>241</sup> *E.g.*, *Stanton v. Stanton*, 421 U.S. 7, 15 (1975).

For instance, in the 1973 case *Frontiero v. Richardson*,<sup>242</sup> a plurality of the Court reasoned that gender classifications warranted heightened judicial scrutiny under the Constitution in part because of the “gross, stereotyped distinctions between the sexes” that saturated “our statute books” for “much of the 19th century.”<sup>243</sup> Similarly, in its 1975 case *Stanton v. Stanton*,<sup>244</sup> the Court struck down, on federal equal protection grounds, a state statute that required parents to support sons until age twenty-one but daughters until just age eighteen on the ground that the law reflected constitutionally impermissible “role-typing.”<sup>245</sup> Indeed, by the late 1970s, anti-stereotyping and anti-role-typing “had become [so] ingrained in the Court’s own understanding of equal protection”<sup>246</sup> that it hardly came as a surprise when the Court reasoned in 1982 that to satisfy constitutional equality demands statutes “must be applied free of fixed notions concerning the roles and abilities of males and females.”<sup>247</sup> “Care must be taken,” Justice O’Connor asserted, “in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.”<sup>248</sup>

While it is certainly true that an anti-stereotyping principle had become “ingrained” in the Supreme Court’s conception of equal protection by the late 1970s and early 1980s, it is also true that that principle was limited in several important respects. For instance, the Court did not apply the anti-stereotyping idea to laws that discriminated on the basis of pregnancy, reasoning in 1974 that pregnancy discrimination did not invariably amount to unconstitutional sex discrimination in part because pregnancy was unique to women and therefore reflected a “true” sex difference.<sup>249</sup> One year earlier, in *Roe v. Wade*,<sup>250</sup> the Court established the abortion right under the Fourteenth Amendment not on equality grounds — as many activists and advocates had hoped<sup>251</sup> — but rather on more abstract, and less satisfying, liberty

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<sup>242</sup> 411 U.S. 677 (1973) (plurality opinion).

<sup>243</sup> *Id.* at 685.

<sup>244</sup> 421 U.S. 7.

<sup>245</sup> *Id.* at 18. Four years later, in *Orr v. Orr*, 440 U.S. 268 (1979), the Court ruled unconstitutional a gender-specific state alimony statute that required only husbands to pay alimony because it “effectively announc[ed] the State’s preference for an allocation of family responsibilities under which the wife plays a dependent role. . . .” *Id.* at 279.

<sup>246</sup> Franklin, *supra* note 14, at 138.

<sup>247</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982).

<sup>248</sup> *Id.* at 725.

<sup>249</sup> *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). Professor Siegel interprets *Geduldig* as a case that “leaves open the possibility that *some* legislative classifications concerning pregnancy *are* sex-based classifications like those considered in *Reed* and *Frontiero*.” Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination* in Hibbs, 58 STAN. L. REV. 1871, 1891 (2006).

<sup>250</sup> 410 U.S. 113 (1973); *see id.* at 164 (finding that the Federal Constitution’s Fourteenth Amendment protects a fundamental right to privacy that includes abortion).

<sup>251</sup> *See generally* Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875 (2010) (examining the sex equality claims that animated feminist abortion rights claims pre-*Roe v. Wade*); GREENHOUSE & SIEGEL, *supra* note 40.



grounds.<sup>252</sup> Several years later, in *Michael M. v. Superior Court*,<sup>253</sup> the Court upheld a sex-specific statutory rape law against a constitutional equality challenge because of physiologically “real” differences between males and females. Taken together, these cases from the 1970s and 1980s demonstrate that the Court was unwilling to extend the anti-stereotyping principle to contexts involving ostensibly “real” sex differences — contexts, like reproduction and sexuality, “where sex-role stereotyping was often strongest.”<sup>254</sup>

Two Supreme Court cases decided in the last two decades have dramatically altered the face of constitutional sex equality doctrine on this issue of “real” sex difference. In the first, *United States v. Virginia*,<sup>255</sup> the Court not only acknowledged real differences between the sexes, but also asserted that such differences “remain cause for celebration . . . not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”<sup>256</sup> “In the past,” Professor Cary Franklin writes, “‘real’ differences served as a check on the reach of anti-stereotyping doctrine.”<sup>257</sup> *Virginia*, however, reverses that trend, making clear that “anti-stereotyping doctrine serves as a check on the state’s regulation of ‘real’ differences.”<sup>258</sup>

In the second, *Nevada Department of Human Resources v. Hibbs*,<sup>259</sup> the Court went even further by extending the anti-stereotyping principle to classifications that affect “mothers or mothers-to-be.”<sup>260</sup> *Hibbs* upheld the constitutionality of the mandatory leave provision of a federal law, the Family and Medical Leave Act (“FMLA”).<sup>261</sup> The majority there reasoned that the FMLA was “appropriate,” and therefore constitutional, legislation under the Fourteenth Amendment because it enforced one of its substantive provisions, namely, the right to equal protection of the laws. By guaranteeing family leave — including pregnancy and caretaking leave — to men and women alike, the Court explained, the FMLA was duly targeting the very role-typing that amounted to impermissible sex discrimination under the Federal Constitution’s Equal Protection Clause.<sup>262</sup> Workplace policies that provided for neither maternity leave nor paternity leave, or that gave maternity leaves that far exceeded the amount of time needed to recuperate from the physical

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<sup>252</sup> See Franklin, *supra* note 14, at 128. Franklin observes that “*Roe* treated abortion as a purely physiological phenomenon, concentrating on female bodies and fetal bodies instead of inquiring if and when the regulation of pregnant women enforced stereotypes about women’s family roles and deprived them of the decisional autonomy accorded to men.” *Id.*

<sup>253</sup> 450 U.S. 464 (1981) (plurality opinion).

<sup>254</sup> Franklin, *supra* note 14, at 90.

<sup>255</sup> 518 U.S. 515 (1996).

<sup>256</sup> *Id.* at 533.

<sup>257</sup> Franklin, *supra* note 14, at 145.

<sup>258</sup> *Id.* at 145–46.

<sup>259</sup> 538 U.S. 721 (2003).

<sup>260</sup> *Id.* at 736 (citation omitted).

<sup>261</sup> 29 U.S.C. § 2612(a)(1) (2006).

<sup>262</sup> See *Hibbs*, 538 U.S. at 728, 736–40.

act of giving birth,<sup>263</sup> reflected the “pervasive sex-role stereotype that caring for family members is women’s work.”<sup>264</sup> Insofar as the FMLA’s mandatory leave provision was intended to counteract such stereotypes — stereotypes about fathers, as well as about “mothers or mothers-to-be” — it represented a valid exercise of congressional power.

*Hibbs* is remarkable for a few reasons. First, its majority opinion was authored by then–Chief Justice Rehnquist, who “was an opponent of the Equal Rights Amendment (ERA) while serving in the Nixon Justice Department,” as well as “a vocal critic of the Court’s sex discrimination jurisprudence in his first decade on the Court.”<sup>265</sup> Second, it treats all “classifications concerning pregnancy that reflect sex stereotypes as sex-based state action.”<sup>266</sup> As such, it “situates abortion regulation in a new constitutional space — one constrained by the anti-stereotyping principle.”<sup>267</sup> That is, if laws limiting access to abortions constitute pregnancy classifications (which they certainly do), and if abortion laws embody sex stereotypes (as this Article has argued is the case), then abortion laws are no less restrained by *Hibbs*’s anti-stereotyping theory of pregnancy than are other pregnancy-related laws (such as the employment issue in *Hibbs*). To be sure, there are reasons to remain cautious about *Hibbs*’s applicability in the abortion context, including the fact that *Hibbs* could be read as a case about the unfairness of regulating “mothers” and “mothers-to-be” in sex-stereotypical ways rather than as a case about the unfairness of regulating women who are arguably neither of those identities *and who do not want to be*.<sup>268</sup> That said, there is but a short step from forcing women *to look like* a certain kind of mother (namely, one that does not work, the stereotype that

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<sup>263</sup> Policies that do not give maternity leave perpetuate the stereotype that pregnant female employees will not return to work after giving birth, and so do not need leave. Similarly, policies that do not give paternity leave perpetuate the stereotype that employee fathers neither want nor need parental leave. Finally, maternity leave policies that far exceed the time normally needed to recuperate from the physical act of giving birth (typically four to eight weeks) perpetuate the stereotype that employee mothers will be primarily responsible for child-rearing and not just for child-bearing. See *id.* at 731.

<sup>264</sup> *Id.*

<sup>265</sup> Siegel, *supra* note 249, at 1872.

<sup>266</sup> *Id.* at 1893; see also Reva B. Siegel & Neil S. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 795–96 (2010) (arguing that “after *Hibbs* it is time to read *Geduldig* more precisely, as holding that discrimination against pregnant woman [sic] is not always sex discrimination — but sometimes can be”).

<sup>267</sup> Franklin, *supra* note 14, at 158.

<sup>268</sup> Other (related) reasons to remain cautious include the following: First, *Hibbs* did not deal with laws that regulated pregnancy (or the pregnant woman) per se, but rather with laws that regulated pregnancy leave. Second, *Hibbs* saw the problem that Congress was rectifying with the FMLA as one that involved “the faultline between work and family — precisely where sex-based overgeneralization has been and remains strongest.” *Hibbs*, 538 U.S. at 738. It remains unclear whether the Court would find that restrictive abortion laws implicate a similar “faultline.” Third, the *Hibbs* Court objected to workplace policies that perpetuated stereotypes about men and women both. *Id.* at 736. It is unclear precisely how restrictive abortion laws perpetuate stereotypes about men.

*Hibbs* rejects) to forcing women to become a mother. In both cases, pregnant women are being regulated in ways that reflect and reproduce deeply rooted cultural "role-types" about womanhood and motherhood, the very "role-types" that under *Hibbs* amount to unconstitutional sex discrimination.

### B. Abortion Disgust and the Anti-Stereotyping Principle

Abortion laws that flow from disgust violate the anti-stereotyping principle of sex equality law because they reflect an attempt to discipline women for violating gender roles — the very behavior that provokes the disgust on which those laws rest. Such laws — which are likely numerous, if we are to take moral psychology's findings with respect to the abortion-disgust relationship seriously — are in tension with the anti-stereotyping principle because they embody an emotion (disgust) that indicates discomfort with women acting "out of place" (as Douglas might say) or "out of role."<sup>269</sup> If disgust for abortion often reflects discomfort with gender nonconforming conduct (as social science suggests), and if abortion opposition and its resultant laws are the product of this emotion (as moral psychology suggests), then abortion laws embody the very stereotypes that *Hibbs* condemns and are constitutionally vulnerable for that reason.

The theory of abortion and disgust presented here furthers the sex equality project of conceptualizing the abortion right (and restrictive abortion laws) in equality, in addition to liberty, terms. Professor Reva Siegel's work on this project is exemplary.<sup>270</sup> (Of course, Professor Siegel is neither the first nor the only scholar to advance an equality argument for the abortion right; numerous other scholars have done so over the past thirty years.<sup>271</sup>)

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<sup>269</sup> See, e.g., DOUGLAS, PURITY AND DANGER, *supra* note 19, at 44 (referring to dirt as "matter out of place").

<sup>270</sup> It would not be an overstatement to say that the contemporary representative of that project is Reva Siegel who has been viewing the rhetoric and reasoning of anti-abortion movements (and the laws they produce) through an anti-stereotyping lens for twenty years. See generally, e.g., Reva B. Siegel, *Reasoning from the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

<sup>271</sup> For the history of the rise, fall, and revival of sex equality arguments for reproductive rights, see Siegel, *Sex Equality Arguments for Reproductive Rights*, *supra* note 3, at 823–38. Equality arguments in favor of the abortion right fall roughly into one of three categories, even though, admittedly, the boundaries separating them are somewhat porous. Some scholars maintain that restrictive abortion laws constitute presumptively unconstitutional sex discrimination because they only apply to women. See, e.g., Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016 (1984) (arguing that "[o]nly women become pregnant; only women have abortions"); Sunstein, *supra* note 213, at 32–33 (arguing that because abortion restrictions only affect women, they constitute facial or de jure sex classifications). Others argue that restrictive abortion laws violate the Federal Equal Protection Clause because they represent the sort of class, caste, and subordinating legislation that its framers rejected. See, e.g., Balkin, *supra* note 212, at 319–20 (arguing that abortion restrictions constitute all three kinds of legislation and therefore violate an originalist interpretation of the Fourteenth Amendment). And still others argue that restrictive abortion laws violate the

Siegel recently analyzed the rhetoric and reasoning that animated South Dakota's categorical abortion ban that was passed legislatively in 2006 (and was overturned through voter referendum that same year). In enacting that law, the state legislature incorporated the findings of an abortion task force, which maintained, among other things, that abortion restrictions were necessary to protect women from "short- and long-term suffering."<sup>272</sup> Siegel argues that findings like this one reflect just the sort of sex stereotypical reasoning about women's "proper roles as wives and mothers"<sup>273</sup> that amounts to unconstitutional sex discrimination under *Hibbs*.

More generally speaking, Siegel argues that abortion restrictions, like South Dakota's, are unconstitutional under a sex-stereotyping theory of sex discrimination when they are motivated, even in part, by views about women's roles — and, in particular, by views about women's roles as mothers, as was the case in South Dakota. She says:

I restrict myself to a narrow[] argument: that arguments for criminalizing abortion *can* reflect judgments about women as well as the unborn, and these judgments about women may be of a kind that the Equal Protection Clause prohibits government to enforce by law. If separate spheres views of women's roles *played a motivating part* in the enactment of abortion restrictions, the abortion restrictions violate the Equal Protection Clause.<sup>274</sup>

In Siegel's view, then, even constitutionally licit rationales, like protecting fetal life, will not save a law that also rests on constitutionally illicit sex stereotyping.<sup>275</sup> As long as sex stereotypes played *a* motivating part in driving restrictive abortion regimes — and not necessarily *the* motivating part —

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Constitution's sex equality guarantees when those laws rest on sex stereotypes, including "separate spheres views of women's roles." Siegel, *supra* note 32, at 999. This Article focuses on this third kind of sex equality argument.

<sup>272</sup> Siegel, *supra* note 32, at 1031.

<sup>273</sup> *Id.* at 1002.

<sup>274</sup> *Id.* at 999 (emphasis added). Siegel has also suggested that abortion laws in which sex stereotyping played a part might also be unconstitutional under *Casey*'s undue burden standard, given that *Casey* made room for equality concerns under that standard. See Siegel, *Dignity and the Politics of Protection*, *supra* note 3, at 1745; see also Franklin, *supra* note 14, at 158 (stating that "[e]quality concerns have played an implicit role in [*Casey*]'s undue burden analysis").

<sup>275</sup> See, e.g., Siegel, *Dignity and the Politics of Protection*, *supra* note 3, at 1751 (stating that "the joint opinion [in *Casey*] adopts an undue burden framework that insists that regulation on behalf of potential life must assume a form that respects women's dignity"). In arguing that abortion laws are unconstitutional if sex stereotypes played "a motivating part" in their enactment, Professor Siegel is importing the Equal Protection Clause doctrine of neutral laws with a disparate impact to the abortion context. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified."); see also *Pers. Admin. v. Feeney*, 442 U.S. 256, 279 (1979) (applying the purpose requirement to gender classifications).

those regimes are not just presumptively, but actually, unconstitutional (in her view).<sup>276</sup>

The key, of course, is in figuring out which abortion regimes are “motivated” by constitutionally impermissible sex stereotypes and which ones are not. Professor Siegel’s work represents one way to make that determination, namely, by focusing on the explicit rhetoric and reasoning of restrictive abortion laws.

This Article offers another. The relationships among abortion, disgust, and sex stereotyping that this Article unearths suggest that we should be as suspicious of abortion lawmaking that is driven by explicit expressions of disgust (as with D&X legislation) as we are of abortion lawmaking that is driven by explicit language about women’s roles as mothers (as with South Dakota’s abortion law).<sup>277</sup> Explicit expressions of disgust in abortion lawmaking signal that sex stereotyping is afoot. In Siegel’s terms, they raise the strong possibility that “views of women’s roles” played “a motivating part” in a law’s enactment.<sup>278</sup> In Douglas’s terms, they suggest “cognitive discomfort” with behavior that violates “cherished classifications.”<sup>279</sup> From a constitutional sex equality perspective, explicit expressions of disgust in abortion lawmaking are at least as troubling as explicit expressions about women-as-mothers.

This Article has also shown, though, that focusing on the emotion of disgust in abortion lawmaking also means being mindful of its implicit presence there.<sup>280</sup> The wealth of empirical work by moral psychologists on the relationships among disgust, moral judgment, and abortion opposition suggests that disgust animates a much larger swath of abortion regulation than

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<sup>276</sup> According to *Village of Arlington Heights*, proof that discriminatory purpose played “a motivating part” in a particular state action warrants strict scrutiny (at least in that case, which dealt with alleged race discrimination under the Fourteenth Amendment’s Equal Protection Clause). 429 U.S. at 266. In other words, laws that are motivated by discriminatory racial purpose are presumptively, not actually, unconstitutional, and might (although unlikely) survive the burdens of strict scrutiny. By contrast, here Siegel is suggesting that abortion laws that are motivated even in part by sex stereotypes amount to an actual equal protection violation. Her recommendation is consistent, though, with the Court’s sex equality jurisprudence, which has outright rejected as unconstitutional state action that (in the Court’s view) embodies sex stereotypes. See, e.g., Franklin, *supra* note 14, at 138 n.296 (observing that “since [intermediate scrutiny] was introduced in 1976, the Court has never upheld a sex classification after determining that it reflects or reinforces sex stereotypes” (citing Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000))).

<sup>277</sup> See *supra* note 275 and accompanying text.

<sup>278</sup> Siegel, *supra* note 32, at 999.

<sup>279</sup> DOUGLAS, PURITY AND DANGER, *supra* note 19, at xi (observing the “cognitive discomfort caused by ambiguity”).

<sup>280</sup> The literature on implicit bias in lawmaking (among other arenas) is far too large to reference here. That said, some notable recent contributions include Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 946 (2006); Jerry Kang & Kristin Lang, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); and Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

we might think. This research raises the strong possibility that “views of women’s roles” play “a motivating part in the enactment” of many, if not most, restrictive abortion laws,<sup>281</sup> even those laws that are completely neutral on their face.<sup>282</sup> In concluding, the next part briefly considers how the law might handle this issue of implicit disgust (and, by extension, implicit sex stereotyping) in abortion lawmaking.

#### IV. CONCLUSION: “RECKONING” WITH ABORTION DISGUST

In a landmark article on unconscious race discrimination and the Equal Protection Clause written twenty-five years ago,<sup>283</sup> titled *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, Professor Charles Lawrence made a compelling case for why the insights of Freudian theory and cognitive science on unconscious racism must be taken seriously if the constitutional command of “equal protection” is to have meaning. He urged legal doctrine to be mindful of “twentieth century psychology,”<sup>284</sup> which showed that racial discrimination is more often the product of “a collective unconscious that we cannot observe directly” than the result of malicious intent.<sup>285</sup> He insisted that “equal protection doctrine must find a way to come to grips with unconscious racism”<sup>286</sup> if it is truly to guarantee “equal opportunity.”<sup>287</sup> And he argued that the way to do that would be for courts to apply “strict scrutiny” to all government action — explicit and neutral alike as far as discriminatory purpose is concerned — that “conveys a symbolic message to which the culture attaches racial significance.”<sup>288</sup>

When Professor Lawrence published his now iconic article in 1987, his principal concern was twofold: First, he sought to convince the legal community that most racism was “id” racism rather than “ego” racism and therefore was largely unreachable by equal protection doctrine and its discriminatory purpose/intent requirement. And second, he sought to offer a test — the subjective cultural meaning test — to deal with this fact. How-

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<sup>281</sup> Siegel, *supra* note 32, at 999.

<sup>282</sup> On more than one occasion, Siegel has recognized that abortion laws might reflect implicit, rather than explicit, sex stereotypes of the kind suggested here. For instance, she has cautioned that

[p]ronounced forms of underinclusivity or overinclusivity in the means by which the state has pursued its interest in protecting maternal health or potential life might reveal that abortion regulation is in fact driven by unconstitutional stereotypes about women — “increasingly outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.”

Siegel, *supra* note 32, at 1052 (quoting *Craig v. Boren*, 429 U.S. 190, 198–99 (1976) (citation omitted)); see also Siegel, *supra* note 249, at 1896 n.120 (same).

<sup>283</sup> Lawrence, *supra* note 33.

<sup>284</sup> *Id.* at 324.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 323.

<sup>287</sup> *Id.* at 326.

<sup>288</sup> *Id.* at 324.

ever, what he did not have to do was this: convince the legal community that unconscious racism was something that it should care about. In other words, Professor Lawrence looked to cognitive science to establish that unconscious racism existed, not to argue that it was a bad thing (that much was assumed).

This Article's principal objective has been to persuade the legal community why it should care about explicit and implicit disgust in abortion lawmaking, particularly now that disgust is a valid basis for abortion regulation and hundreds of restrictive abortion laws have been passed throughout the United States over the past two years — many of which seem calculated to provoke disgust for the abortion right more than anything else. Like *The Id, The Ego, and Equal Protection*, this Article looks to cognitive science — specifically, to moral psychology — to establish three things: that disgust for abortion exists; that disgust animates abortion opposition; and that disgust likely underwrites a large swath of restrictive abortion laws, not just those laws that target inflammatory abortion methods (D&X) and controversial abortion issues (fetal pain). Unlike Lawrence's piece, though, this Article makes the case for why we ought to care about disgust's explicit and implicit presence in abortion lawmaking in the first place.

For this reason, this Article has left unanswered the question of how the legal community might "reckon with" abortion disgust in more concrete ways — other than to acknowledge that it exists and is something that we ought to care about. Answering that question is well beyond the scope of this Article's more limited area of concern, even as it might represent its next logical chapter.

With that being said, let me conclude here by offering just a few brief suggestions with respect to what that "reckoning" might look like. First, and as argued above, explicit expressions of disgust in abortion lawmaking ought to be treated the same as explicit expressions of women's preferred roles, and should thus trigger the application of heightened scrutiny. Disgust is such a potent disruptor of egalitarian norms that its overt presence in abortion lawmaking ought to raise particular concern from a constitutional equality standpoint. In the context of sexual orientation, overt disgust for sexual minorities is both a constitutionally illegitimate reason for lawmaking under rational basis review,<sup>289</sup> as well as one of the reasons why some courts have applied heightened scrutiny to state action that discriminates against gays and lesbians.<sup>290</sup> In other words, in that context, disgust has been relevant for

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<sup>289</sup> See *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (holding that morality does not constitute a legitimate state interest under the Due Process Clause); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that animus or hostility against individuals on account of their membership in a class — there, sexual minorities — does not constitute even a legitimate state interest under the Equal Protection Clause).

<sup>290</sup> See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 466 (Conn. 2008) (stating that the fact that "gay persons . . . face virulent homophobia that rests on nothing more than feelings of revulsion toward gay persons and the intimate sexual conduct with which they are associated" and are the targets of "visceral prejudice" is relevant to a determination whether sexual minorities constitute a quasi-suspect class for state equal protection purposes).

courts on the back end of a constitutional analysis (as a reason to strike down state action) as well as on the front end (as one factor to consider when determining what level of review to apply to state action in the first place). There is no reason to treat explicit expressions of disgust in abortion lawmaking any differently, particularly given the sex stereotyping that such expressions signal.

However, it is likely the case that most disgust in abortion lawmaking is implicit, not explicit. Thus, just as “equal protection doctrine must find a way to come to grips with unconscious racism,”<sup>291</sup> so too must abortion doctrine find a way to come to grips with implicit disgust and sex stereotyping in abortion regulation. One possibility is simply to assume that all abortion regulations are presumptively unconstitutional because they are likely driven by an emotion that is in tension with constitutional equality norms, particularly after *Hibbs*. Professor Nussbaum has made a similar proposal with respect to all laws targeting sexual minorities. Currently, such laws, like abortion laws, are afforded only rational basis review under the Federal Equal Protection Clause.<sup>292</sup> Nussbaum contends that the “pervasiveness” of negative stereotypes about gay people justifies replacing rationality analysis with heightened scrutiny for all sexual orientation classifications — even, or especially, those classifications where malicious intent is lacking.<sup>293</sup> In her view, heightened scrutiny is necessary “[t]o root out discrimination in such cases.”<sup>294</sup> So too here might we argue that the “pervasiveness” of disgust in abortion lawmaking, coupled with an understanding of what that disgust means, justifies the application of heightened scrutiny to all abortion classifications, even those classifications where disgust is facially absent.

These are just suggestions about how the law might translate the insights of psychology and social science into legal doctrine. This Article has taken the necessary first step toward achieving that translation by arguing

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<sup>291</sup> Lawrence, *supra* note 33, at 323.

<sup>292</sup> For sexual orientation classifications, see *Romer*, 517 U.S. at 631–32 (applying rational basis review only to a sexual orientation classification). For abortion laws, see *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 548 (9th Cir. 2004) (suggesting that heightened scrutiny does not necessarily apply to abortion restrictions reviewed under the Equal Protection Clause after *Hibbs* because “*Hibbs* does not compel the conclusion that [gender] discrimination [in the abortion context is the sort] a court can remedy”); *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 173–75 (4th Cir. 2000) (upholding the constitutionality of a South Carolina regulation establishing licensure and operational requirements for physicians’ offices and medical clinics that performed five or more first trimester abortions per month, and applying only rational basis review to that regulation). With respect to abortion laws reviewed under the Due Process Clause, commentators have argued that *Casey*’s undue burden standard, which replaced *Roe*’s strict scrutiny standard, constitutes something lower than strict scrutiny and closer to rational basis review. See David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 686–87 (1994) (arguing that *Casey* rendered the fundamental right established by *Roe* less fundamental); Elizabeth A. Schneider, Comment, *Workability of the Undue Burden Standard*, 66 TEMP. L. REV. 1003, 1028–31 (1993) (arguing that *Casey* set forth a rationality standard for abortion restrictions).

<sup>293</sup> NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 9, at 122.

<sup>294</sup> *Id.*



why disgust's role in abortion law is even an issue that we should care about at all. The theory of abortion and disgust that it develops establishes a foundation for thinking more broadly and more critically about the myriad forms that sex discrimination assumes, as well as the myriad ways in which restrictive abortion regimes inflict "sex-based harms."<sup>295</sup> More narrowly, the theory it offers provides yet another reason to remain skeptical of disgust in all lawmaking, and particularly in lawmaking that bears on identity interests so directly.

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<sup>295</sup> Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1228 (2012) (arguing that reproductive rights "have suffered from an inability of courts and lawmakers to understand infringements on reproductive freedom as sex-based harms").